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WISCONSIN REPORTS

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CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

NOVEMBER 28, 1902 — FEBRUARY 24, 1903.

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN,
JOSHUA ERIC DODGE.

Attorney General, { EMMETT R. HICKS, (To Jan. 5, 1903.) L. M. STURDEVANT, (From Jan. 5, 1903.)

Clerk, - - - CLARENCE KELLOGG.

MEMORANDA.

Mr. Justice DODGE took no part in the decision of the case of *Church of the Good Shepherd v. Racine Water Co.*, reported on page 11.

Mr. Justice BARDEEN took no part in the decision of the cases in which the opinions were handed down December 16, 1903 (reported on pages 74–154).

In the case of *Matteson v. Rice*, reported on page 328, Mr. Chief Justice CASSODAY dissented.

ERRORS NOTED IN PREVIOUS VOLUMES.

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Page, 120, line 11. For affirmed, read reversed.

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CASES DETERMINED

AT THE

August Term, 1902.

SIBLEY, Appellant, vs. WEINBERG and another, Respondents.

November 11—November 28, 1902.

Judgment by default: Requiring proof: Discretion.

1. Subd. 2, sec. 2891, Stats. 1898 (providing for judgment on failure to answer in actions other than those on contract for the recovery of money only), while it does not make it essential to the validity of the judgment that a verified complaint be supported by evidence, nevertheless preserves to the court the right and power, in its discretion, to require proof.
2. The exercise of such discretion against the rendition of a judgment without proof will not be reviewed on appeal, except in extreme cases showing clearly that the discretion has been abused.
3. Upon an application for judgment on failure to answer in an action of replevin, it was not an abuse of discretion to require that the unlawful taking and detention be proved by evidence other than a complaint verified by an agent whose personal knowledge of such facts did not appear.
4. After the ordering of a nonsuit in such case on the ground that the unlawful taking and detention had not been proven, the refusal of the court to reopen the case and permit plaintiff to supply further proof is *held*, though severe, not to have been a clear abuse of discretion.

APPEAL from a judgment of the municipal court of Racine county: D. H. FLETT, Judge. *Affirmed.*

This was an action of replevin, in which the complaint substantially alleged that the plaintiff held a chattel mort-

gage upon certain dental apparatus and furniture sold by him to one Nathan Weinberg, whereon there remained due about $10, and that he held title to certain other dental apparatus by virtue of the reserved condition in certain promissory notes given therefor by said Nathan Weinberg, providing that until their payment title and ownership should remain in the plaintiff, upon which notes there was due $74.60 and interest; that said Nathan Weinberg died July 5, 1900, and that a special administrator of his estate, on July 17, 1900, under an order of court, made a bill of sale of all said property to the defendant *Charles I. Shoop* for the nominal consideration of $500, and that said transaction was, by connivance with the defendant *Shoop* and *Maude Weinberg,* the widow of said Nathan Weinberg, to defeat the latter's creditors, and that said *Shoop* still claimed to be the owner, but that in pursuance of said connivance the defendant *Maude Weinberg* was still in possession; that said defendants had wrongfully taken, and still did unlawfully and wrongfully detain, all said property, of which plaintiff was the owner and lawfully entitled to possession, which was refused him, although demanded.

The defendants having defaulted after appearance, the plaintiff gave notice of application for judgment, and on the day notified—December 6, 1901—appeared in court, and offered evidence, extending, however, only to the introduction in evidence of his notes and mortgage, proof of the amounts due thereon, and proof of the value of the property and of the value of its use during the time that the defendants were charged in the complaint to have retained it. Thereupon, after argument, to wit, December 31, 1901, the court entered an order reciting that the evidence had failed to prove the allegations of the complaint, and failed to show that the personal property was unlawfully taken or unlawfully detained by the defendants, or either of them, and ordering judgment of nonsuit. Thereupon the plaintiff re-

quested to have the case reopened, and an opportunity given to furnish such further proof as the court desired to enable it to enter judgment for the plaintiff according to the prayer of the complaint, which request was denied, and excepted to. Thereupon judgment of nonsuit was entered, reciting that the evidence and proofs presented failed to establish a cause of action in favor of the plaintiff and against the defendants; from which judgment the plaintiff appeals.

W. W. Rowlands, for the appellant.

For the respondents there was a brief by *Cooper, Simmons, Nelson & Walker,* and oral argument by *J. B. Simmons.*

DODGE, J. The principal question raised upon this appeal is the true construction of subd. 2, sec. 2891, Stats. 1898, which provides that judgment may be had if the defendant fail to answer the complaint in actions other than those arising on contract for the recovery of money only, as follows:

"In other actions the plaintiff may, upon the like proof, apply to the court for judgment according to the demand of the complaint. If the taking an account or proof of any fact be necessary to enable the court to give judgment or to carry the judgment into effect the plaintiff may, with a view to such application, at any time after the expiration of the time for answering, have an order of reference, by the court or a judge, to take such account or proofs and report the same to the court at any time, in the circuit, at which judgment may be rendered, and such reference may be executed in any county most convenient therefor; or upon such application being made the court may take the account, or hear the proof, or in its discretion order a reference for that purpose. And when the action is for the recovery of money only or of specific real or personal property, with damages for the withholding thereof, the court may order the damages to be assessed by a jury. If the defendant shall have appeared in the action he shall be entitled to eight days' notice of such application for judgment."

It is contended by the appellant that under this statute the plaintiff, upon failure of answer, is absolutely entitled to judgment upon the facts alleged in the complaint and according to the prayer for relief, without any proof of the cause of action so set up, he merely being permitted to furnish proof of such incidental facts as may enable the court to properly frame its judgment in certain cases. On the other hand, it is contended, first, that this section does not dispense with proof at all; that the plaintiff is required to prove the case made by his complaint by evidence, and cannot invoke the undenied allegations of the complaint for that purpose, although verified. But, further, if that extreme view be not taken, that the section does not give the plaintiff absolutely the right to judgment without evidence, but preserves to the court the right and power to demand proof, if, in its discretion, it deems wise.

The section is in a measure ambiguous. It does not provide that upon failure to answer the plaintiff shall be entitled to judgment, but entitled to make application for judgment. Its exact force has never been decided by this court, except so far as *Potter v. Brown Co.* 56 Wis. 272, 14 N. W. 375, has declared against the more extreme of the two positions apparently contended for by the respondents, namely, that in all cases the cause of action stated in the complaint must be supported by evidence. In that case it is said that no evidence is *necessary,* except so far as may be necessary to enable the court to render judgment. This statement is concurred in by the supreme court of Minnesota in *Exley v. Berryhill,* 37 Minn. 182, 33 N. W. 567, and of South Dakota in *Cole v. Custer Co. A. M. & S. Asso.* 3 S. D. 272, 52 N. W. 1086. In all of these cases, however, it should be noted that the subject presented to the appellate court was the validity of judgments which had been entered by the trial courts, without insisting upon proof of the cause of action. None of them presented the question

whether it would have been error for the trial court to have refused judgment without such proof, and in none of them was that question discussed or decided. On the other hand, the textwriters, with reference to the Code of New York,—which is the source from which this section in our Code was drawn,—declare that there is no absolute right, except in the case of a mere money demand on contract, to judgment upon the complaint alone, but that discretion rests in the trial court to demand that the cause of action asserted shall be established by proof; thus placing the situation in analogy to the ancient practice on a bill in equity taken *pro confesso* by reason of default. 2 Till. & S. Prac. 257, 269; 3 Wait, Prac. 561, 650. That, independently of the Code, it was within the recognized discretion of a court of equity, in the interest of justice, and to prevent mistake and injustice, to require proof, even in the case of a default upon which a bill in equity was taken as confessed, is, of course, familiar. *Hayes v. Brierley,* 3 Dru. & War. 274; *Sullivan v. Sullivan,* 42 Ill. 315. After the adoption of the Code in New York, and as early as 1848, we find a trial court assuming the same authority and ruling against an application for judgment because he was not satisfied of some of the essential facts therein stated without proof additional to the verified complaint. *Didier v. Warner,* 1 Code Rep. 42. In 1851 it was said, just as in *Potter v. Brown Co.* 56 Wis. 272, 14 N. W. 375, that upon such complaint further proof was not *necessary* (*Hurd v. Leavenworth,* 1 Code Rep. N. S. 278), and in a note to *Depew v. Leal,* 2 Abb. Pr. 131, 138 (decided in 1855), BOSWORTH, J., after consulting with DUER, J., held that there should be a reference, or the court should itself take proof of the facts stated in the complaint; and the latter alternative was adopted, and is commended by the reporter. Thus it seems that before the adoption of our own Code a practice had become established in New York, though not confirmed by the court of last resort, to the effect that, while

the statute did not render essential to the validity of the judgment that a verified complaint be supported by evidence, nevertheless it did not require the court to render judgment thereon without such evidence, if, in its discretion, the same were deemed wise or necessary. The latter proposition has received express approval from the supreme court of Nevada in *Haley v. Eureka Co. Bank,* 21 Nev. 127, 26 Pac. 64.

Upon full consideration, we adopt this as the true construction of our own statute above quoted. Many considerations tend to confirm us in so doing. The experience of the individual members of the court leads to the belief that there has been a general practice in the circuit courts of the state to exercise discretion, and in cases of doubt or apprehension of injustice to require more or less complete confirmation of the allegations of even a verified complaint by legal evidence, before taking the final and drastic step of adjudging the rights of the parties, even when the defendant was in default. This court has assumed power to require by rules that such step shall be taken in all cases in actions of divorce and to foreclose mortgages, thus indicating at least its opinion that the statute had not given plaintiffs absolute right to judgment upon default. Again, complaints are permitted to be verified, under our statute, upon information and belief, and many of the most important of the facts therein alleged may, therefore, not have received the support of the oath of any person who has knowledge on the subject. Defaults may often occur under circumstances of oversight or omission, or misapprehension of the full effect of the allegations of the complaint; so that, if the latter be taken as absolutely true, judgments to the full extent of the relief thereby justified and claimed may well do injustice. We think the permanence and correctness of default judgments will be enhanced by caution on the part of circuit courts in rendering judgment, if, upon reading the complaint, there is doubt as to existence of the facts alleged or uncertainty as to how far

they are true; and that such courts do not commit error, but should rather be commended, in declining to enter judgment until such doubts and uncertainties have been removed. Such function, involving as it does a wise judicial discretion, will not, when exercised against the rendition of judgments, be reviewed by this court except in extreme cases showing clearly that such discretion has been abused. We cannot say that any such abuse appears in the present case in the mere act of insisting that the unlawful taking or withholding by the defendants should be established by something more than the verified complaint,—in this particular instance verified by an agent, with nothing to indicate that such alleged acts of the defendants were within his personal knowledge. We therefore hold that no error was committed in the refusal of judgment for plaintiff and the ordering of nonsuit.

Error is assigned, also, on the refusal of the trial court to reopen the case and permit plaintiff to supply further proofs, after the decision had been made, but before judgment had been entered. We confess to the feeling that the action of the court was drastic and severe, and to the view that it would have been more likely to promote complete justice to have granted this request; but, recognizing that the record before us may fail to present all the aspects of the case apparent to the trial judge, we cannot assume to declare that his refusal to exercise his discretion to grant plaintiff further privileges was a clear abuse, so that the judgment could be reversed by reason thereof.

By the Court.—Judgment affirmed.

MOREY, Executor, Appellant, vs. CITY OF RACINE, Respondent.

November 11—November 28, 1902.

Municipal corporations: Assessors: Service on board of review: Compensation.

The city charter of Racine, under the head of "Assessors: their powers and duties," provides (sec. 20, ch. 40, Laws of 1891) that the assessors shall assess all the property in the city in one assessment roll; that "the assessment shall be reviewed and corrected and notice of such review shall be given," etc.; and that upon the correction of the assessment, the assessment roll shall be verified by the oaths of the assessors and deposited with the clerk. *Held*, that this makes it a part of the official duty of the assessors to serve upon the board of review, and that for such service they are not entitled to compensation beyond the salary fixed under sec. 15, which provides that such salary "shall be in full for all services by them to be rendered."

APPEAL from an order of the circuit court for Racine county: E. B. BELDEN, Circuit Judge. *Affirmed.*

The appeal is from an order sustaining a demurrer to the complaint, which alleges the municipal corporate character of the defendant, and that plaintiff's decedent, James A. Beaugrand, during the years 1896, 1897, 1898, and 1899, was an assessor; that the salary of each of the assessors for each of said years was $300, which was duly paid to plaintiff's decedent; that during each of said years said decedent *ex officio* was a member of the board of review of the city of *Racine,* and performed his duties as such, "and that the city of *Racine* became indebted to said Beaugrand for such services in the sum of $300 for each and every of said years, in all the sum of $1,200," no part of which has been paid, except $100 each year, leaving a balance due of $800, for which judgment is prayed.

For the appellant there was a brief by *William E. Lee,*

attorney, and *Thomas M. Kearney,* of counsel, and oral argument by *Mr. Kearney.*

M. E. Walker, for the respondent.

BARDEEN, J. The sole question arising upon this appeal is whether, under the charter of the city of *Racine* and the general laws of the state, the plaintiff's decedent was entitled to pay for services on the board of review in addition to the compensation received by him for services as assessor. The original charter of *Racine,* granted in 1848, imposed no duty upon the assessors with reference to a review or correction of the assessment roll. By sec. 24, ch. 130, Laws of 1868, the legislature provided that the mayor, clerk, and assessors of each city in this state should constitute a board of review for such city, and sec. 25 prescribed their duties. Sec. 24 also provided that the board should receive the same compensation allowed by the law to assessors. Under the law and the charter as then in existence, the assessors would be entitled to the compensation fixed by the charter for making the assessment, and also at the same rate for service on the board of review. By ch. 313, Laws of 1876, the charter of *Racine* was revised, consolidated, and amended. Prior to this time the charter contained no provision requiring the assessors to act as members of the board of review. By sec. 11, tit. 3, of the new charter, the duties of assessors were prescribed. They were to assess all the taxable property of the city; make out the assessment roll; and said roll was to be equalized, "and notice given thereof by the assessors at the time and in the manner required by law," and, after so equalized, was to be verified by the oath of each assessor, and deposited with the city clerk. Sec. 1, tit. 12, fixed the compensation of the assessors at not to exceed $200 for all services during their term of service, and provided that the salaries and allowances as fixed by the common council "shall be accepted by such officers and others respectively as their

sole compensation for the services for which such salaries are allowed." The charter of *Racine* was again revised and amended in 1891. Sec. 20, tit. 3, ch. 40, of the laws of that year provided that the assessors should assess all the property in the city in one assessment roll. "The assessment shall be reviewed and corrected, and notice of such review shall be given as provided by law," etc. Upon the correction of the assessment the roll was to be verified by the assessor, and deposited with the clerk. Sec. 15, tit. 2, increased the salary limit of assessors to $300 each, and further provided that such sum "shall be in full for all services by them to be rendered, and in lieu of all fees and perquisites to which they might be otherwise entitled," and was to be paid at the conclusion of their duties each year.

We think it is reasonably apparent that sec. 20, tit. 3, imposes upon the assessors the duty, with the other members of the board of review, to review and correct the assessment made by them. This construction is confirmed to a certainty by the further provision found in sec. 15, tit. 2, which says that the compensation provided therein for assessors "shall be in full for all services by them to be rendered, and in lieu of all fees and perquisites to which they might otherwise be entitled." The functions of the assessors did not end when the roll was turned over to the board of review. The law required them to make all corrections to the assessment roll ordered by the board of review, and then to verify the same, and deposit such roll with the city clerk. We think the charter provisions mentioned make it a part of the official duty of the assessors to serve on the board of review, and thus bring the case within *Anderson v. Milwaukee,* 113 Wis. 1, 88 N. W. 905.

By the Court.—The order appealed from is affirmed.

CHURCH OF THE GOOD SHEPHERD, Appellant, vs. RACINE WATER COMPANY, Respondent.

November 12—November 28, 1902.

Appeal: Affirmance: Court equally divided.

One justice being disqualified to sit and the others being equally divided in opinion, the order of the trial court is affirmed without statement of the reasons for the diverse views.

APPEAL from an order of the circuit court for Racine county: FRANK M. FISH, Circuit Judge. *Affirmed.*

This is an appeal from an order sustaining a demurrer to a complaint in an action to restrain the defendant from cutting off the plaintiff's water supply. The complaint alleges, in effect, the incorporation and organization of the plaintiff as a religious society in 1893; the granting of certain franchises and privileges to the defendant by the common council of the city of Racine in 1886–87; the acceptance thereof by the defendant in writing about that time; that such ordinance, among other things, required the defendant at all times to supply the 300 or more hydrants with water as therein required, at the prices therein mentioned, and also to supply abundant water to any and all inhabitants of the city, as therein required, under such regulations and conditions as the defendant might interpose, at annual rates not exceeding the maximum rates therein mentioned; and the ordinance also contained this provision,

"The said company shall furnish water, free, for all necessary purposes to the public schools and city buildings; for one drinking fountain in each ward; for construction of city work, and also *for all personal uses of all religious and educational institutions;*"

that in 1893 the plaintiff caused its land and church building to be connected by service pipe with the defendant's water mains for the personal uses of the plaintiff, and none other;

that from that time down to the commencement of this action the defendant had continued to supply the premises and church building with water for the personal uses of the society, and none other; that, contrary to such provision of the ordinance, the defendant had persistently sent to the plaintiff semi-annually, in advance, bills at the rate of $6 per annum for the water so supplied to the plaintiff for such personal uses, and demanded payment thereof, and threatened to shut off the water unless paid; that under the influence of such threats, and in ignorance of such provisions of the ordinance, the plaintiff paid such bills as were presented from time to time, without protest, until February, 1901, the total amount so paid being $45; that at the last mentioned date the plaintiff, under the advice of counsel, declined to make further payments; that July 1, 1901, the defendant demanded the further payment of $3, and threatened to shut off the water if not paid, and so the plaintiff paid the same under protest. The complaint prays judgment that the defendant be permanently restrained from shutting off such supply of water to the plaintiff, and that the defendant be required to furnish and supply the plaintiff with such water free of charge, as required by the ordinance, and to repay to the plaintiff the amount so unlawfully exacted and collected from the plaintiff, and for costs.

For the appellant there was a brief by *Cooper, Simmons, Nelson & Walker,* and oral argument by *J. B. Simmons.*

For the respondent there was a brief by *Quarles, Spence & Quarles* and *Kearney, Thompson & Myers,* and oral argument by *T. M. Kearney* and *T. W. Spence.*

CASSODAY, C. J. It so happens that Mr. Justice DODGE was of counsel in the subject-matter of the suit, and hence is barred from participating in the decision. The case is important, and has received the careful consideration of all the other members of the court. The result is that we find our-

selves equally divided. Mr. Justice WINSLOW and Mr. Justice BARDEEN think the order should be reversed. Mr. Justice MARSHALL and I think it should be affirmed. The same conditions would work an affirmance had the trial court decided the other way. This being so, we have concluded not to give any reasons for the diverse views entertained.

By the Court.—The order of the circuit court is affirmed.

EUTING, by Guardian *ad litem,* Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

November 12—November 28, 1902.

Railroads: Exploding torpedo on track: Injury to bystander: Liability: Scope of engineer's employment: Court and jury.

1. Upon the evidence in this case it is *held* to have been a question for the jury whether a torpedo placed upon the track in front of an engine was put there by the fireman without the knowledge of the engineer, or by the engineer himself.
2. Railroad torpedoes should, as matter of law, be considered as dangerous agencies.
3. An engineer in whose custody a railway company has placed torpedoes to be used only as signals to trains, who for his own amusement puts one of such torpedoes upon the track in dangerous proximity to third persons, and then moves his engine over it, causing it to explode and injure one of such persons, is not acting beyond the scope of his employment, but is violating a duty resulting from such employment, and the company is responsible for his acts.
4. An engineer who, knowing that a torpedo has been placed upon the track in front of his engine in close proximity to bystanders, moves his engine over it in the course of his employment, is guilty of a negligent act for the proximate result of which the railway company is liable.

APPEAL from a judgment of the circuit court for Kenosha county: E. B. BELDEN, Circuit Judge. *Reversed.*

This is an action for personal injuries. Many of the facts

are undisputed. It appears that in May, 1899, the defendant company constructed a temporary spur track along one of the streets of the city of Kenosha running into a public park in that city (in which a library building was being constructed) for the purpose of delivering materials for the construction of the building; that the track was not fenced; that on the morning of July 6, 1899, a switch engine operated by an engineer and fireman ran over said track into the park for the purpose of pulling a freight car, which had run off the end of the track, back upon the track; that the engine was attached to the car, and made several attempts to pull it; that some boys were standing in the park nearby, watching the operation, and that a delayed celebration of the Fourth of July was going on; that the plaintiff was one of the boys thus watching, and that he was about nine years of age; that either the fireman or the engineer descended from the cab of the engine, and placed a railroad torpedo on the track about a foot from one of the driving wheels; that the man who placed the torpedo on the track immediately got into the cab again, and the engine was moved over the torpedo, exploding it; and that a flying piece of metal therefrom buried itself in plaintiff's leg, inflicting a serious injury; and that the plaintiff did not know what it was that the man put upon the track. The engineer testified that he did not place the torpedo on the track, and did not know it was there, and the fireman testified that he placed the torpedo on the track for his own amusement, and that the engineer did not direct him to do so nor know that it was done. On the other hand, testimony was given tending to show that the engineer himself placed the torpedo on the track.

At the close of the evidence the court directed a verdict for the defendant, and from judgment thereon the plaintiff appeals.

For the appellant there were briefs by *Baker & Baker,* and oral argument by *N. L. Baker.* They argued, among other

things, that if the employees of defendant used its torpedoes and engine while entrusted to them for use in its business, for their amusement by negligently running the engine over the torpedoes, causing injury, the defendant would be liable, because the defendant has been negligent in the performance of its duty to guard and safely keep such dangerous appliances. 1 Thompson, Negligence (2d ed.) §§ 522, 523; 2 Shearman & Redf. Negligence (5th ed.) § 683; *Toledo, W. & W. R. Co. v. Harmon,* 47 Ill. 298; *Chicago, B. & Q. R. Co. v. Dickson,* 63 Ill. 151; *Nashville & C. R. Co. v. Starnes,* 9 Heisk. 52, 24 Am. Rep. 296; *Skipper v. Clifton Mfg. Co.* 58 S. C. 143, 36 S. E. 509; *Texas & P. R. Co. v. Scoville,* 62 Fed. 730; *Dinsmoor v. Wolber,* 85 Ill. App. 152; *Ritchie v. Waller,* 63 Conn. 155, 27 L. R. A. 161; *Schaefer v. Osterbrink,* 67 Wis. 495; *Pittsburg, C. & St. L. R. Co. v. Shields,* 47 Ohio St. 387; *Harriman v. P., C. & St. L. R. Co.* 45 Ohio St. 11; *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Bryan v. Adler,* 97 Wis. 124; *Fick v. C. & N. W. R. Co.* 68 Wis. 469.

Edward M. Hyzer, for the respondent, cited *Winkler v. Fisher,* 95 Wis. 355; 1 Thompson, Negligence, §§ 526, 527; *Guille v. Campbell,* 200 Pa. St. 119, 55 L. R. A. 111; *Chicago, B. & Q. R. Co. v. Epperson,* 26 Ill. App. 72, 79; *Smith v. L. V. R. Co.* 78 Hun, 630; *Cousins v. H. & St. J. R. Co.* 66 Mo. 572; *Bowler v. O'Connell,* 162 Mass. 319, 27 L. R. A. 173, also note, p. 161. See, also, note in *Missouri, K. & T. R. Co. v. Edwards,* 25 Am. & Eng. R. Cas. (N. S.) 431.

WINSLOW, J. The respondent's contention (which seems to have been adopted by the trial court) is, in brief, that the uncontradicted evidence shows that there was no occasion for the use of the torpedo in the transaction of the defendant's business; that it was placed in the care of the engineer, and the fireman had no authority to take it; that the fireman took it without the knowledge of the engineer, and placed it upon the track for his own amuse-

ment; that in so doing he was entirely outside the scope of his employment, and hence that his principal is not responsible for the results of his act. If this contention were fully justified by the facts it is difficult to see how the conclusion could be avoided. We agree with counsel that the evidence shows that there was no occasion for the use of the torpedo at this time in the transaction of the defendant's business. It is clear that under the rules of the company it was only to be used as a signal to be put on the track when it was desired to stop an approaching train. We also agree that the evidence shows that it was placed in the care of the engineer, and that the fireman had no right to use it, or authority to take it from the engine, save as directed by the engineer. We cannot, however, admit that the uncontradicted evidence proves that the fireman placed the torpedo on the track without the authority or knowledge of the engineer. It is true that the fireman testifies to this effect, and that the engineer denies that he put the torpedo on the track, or knew of its being placed there, but there is evidence on the part of the plaintiff tending directly to show that the engineer himself placed the torpedo on the track. The nature of the evidence was as follows: The plaintiff and his two companions testified that a man jumped from the cab, placed something on the track, the character of which they did not know, and climbed back into the cab, pulled the lever, and started the engine, when the explosion took place. The engineer testified that the fireman did nothing about the operation of the engine, but that he himself pulled the throttle, and started it. Again, the plaintiff at the trial identified the engineer (both fireman and engineer standing before him) as the man who put the torpedo on the track. We regard this evidence as amply sufficient to carry the question to the jury.

So, in considering the motion to direct a verdict, it must be taken as though it were proven that the engineer placed the torpedo on the rail, and moved the engine over it, caus-

ing the explosion; and the question is whether a verdict against the defendant could be sustained upon this state of facts. That railroad torpedoes are, in their nature, dangerous agencies, cannot be doubted. It is common knowledge that they are loaded with some high explosive, and with a sufficient amount thereof to cause a loud explosion; and the danger which exists, even in the explosion of toy torpedoes, is too well understood to admit of doubt that railroad torpedoes should be considered as dangerous agencies as matter of law.

So the situation to be considered upon the motion is this: The defendant placed these dangerous explosives in the custody of its servant, to be placed on the track in certain contingencies as a warning to approaching trains. The servant, however, placed one on the track when not contemplated by the employer, evidently for his own amusement, and in dangerous proximity to third persons, and moved the engine over it, causing it to explode, and inflict injury on one of such persons; and the question is whether a verdict for the injured person against the principal can be sustained under such circumstances. We think this question must be answered in the affirmative. The principle that a master is not responsible for the torts of his servant when the servant has departed from his employment is well understood. If this principle were as easy of application as it is of statement, we should have little difficulty; but, like many another simple and plain principle, its application to concrete facts is sometimes very difficult. The question, generally, is whether the servant has departed from his employment, or whether he has departed from or neglected a duty in the line of that employment. In the first case the principal is not responsible for his acts, and in the second case he is. Applying the principle to the present case, supposing that the jury had found that the engineer placed the torpedo on the track, it seems quite plain that a verdict for the plaintiff might be sustained.

The engineer's duty was to operate the engine; to take care of the torpedoes, and see that they were used only at proper times and places. The company had placed in his charge these dangerous agencies, and authorized him to use them at proper times. In placing one of them upon the track as he did, he was doing what the company had directly authorized him to do; but he was not doing it at the time or place authorized by the master. He was not beyond the scope of his employment, but he was wilfully or wantonly violating a duty resulting from his employment, namely, his duty to safely keep and properly use the torpedoes. There have been many cases involving the application of this principle, and they cannot be said to be entirely harmonious; but the principle above stated is believed to be substantiated by the great weight of authority. The doctrine is quite well stated in *Pittsburgh, C. & St. L. R. Co. v. Shields,* 47 Ohio St. 387, 24 N. E. 658, 8 L. R. A. 464, as follows:

"A servant may depart from his employment without making his master liable for his negligence when outside of the employment of his master, and he so departs whenever he goes beyond the scope of his employment and engages in affairs of his own, but he cannot depart from the duty intrusted to him when that duty regards the rights of others in respect to the employment of dangerous instruments by the master in the prosecution of his business, without making the master liable for the consequences; for the first step in that direction is a breach of the duty intrusted to him by the master, and his negligence in this regard becomes the negligence of the master."

The cases upon this subject will be found quite fully cited in the case of *Alsever v. M. & St. L. R. Co.* 115 Iowa, 338, 88 N. W. 841. This was a case where an engineer blew off steam from a blow-off cock solely for the purpose of frightening some children, and one of the children, by reason of her fright, fell, and broke her leg, and it was held that a verdict for the plaintiff could be sustained under the principles herein stated.

There is, however, another view which may be taken of the case as made by the plaintiff's evidence, which also leads to the conclusion that it was a proper case for the jury to pass upon. If it be true as the evidence tends to show that the engineer placed the torpedo on the track, then he knew that a dangerous explosive was on the track immediately in front of the driving wheel at the moment he moved the engine, and that third persons were in close proximity. If, under such circumstances and with that knowledge, he moved his engine in the attempt to pull the car upon the track, the master would unquestionably be liable for injuries to such third persons which were proximately caused by the engineer's negligent act. Upon the plainest principles, the engineer could not, in prosecuting his master's business, move his engine over an obstacle or dangerous place upon the track which was known to him, when such movement was plainly imminently dangerous to third persons, without rendering his master liable for the proximate result of his negligent act. These views necessitate reversal of the judgment.

By the Court.—Judgment reversed, and action remanded for a new trial.

WUERFLER, Appellant, vs. THE TRUSTEES OF THE GRAND GROVE OF WISCONSIN OF THE ORDER OF DRUIDS, Respondent.

November 12—November 28, 1902.

Life insurance: Benefit societies: Transactions with members: Ultra vires: *Contracts: Constitution of benefit society: Amendments: Certificate of membership: Voluntary associations, when subject to judicial control: Payment of dues: Waiver: By-laws: Conditions: Pleading.*

1. Transactions between a benefit society and its members are governed by the rule, that when a contract made by a corporation has been so far executed that to allow the corporation to repu-

diate it would work injustice to the other party thereto, who has in good faith relied thereon, the doctrine of estoppel applies and prevents repudiation, regardless of whether the corporation had a right to make it or not, unless the act of the corporation was in violation of some written law of the state, or of sound public policy.

2. A certificate issued by a benefit society to a member pursuant to the then existing constitution of the society, and on which he has in good faith relied and paid his dues, cannot be avoided by the society on the ground of *ultra vires*, because an amendment to the constitution, authorizing the issuing of such certificate and under which it was in fact issued, was not made in the particular method provided by the constitution.

3. W. had been a member of a benefit society for over twenty years prior to his death in 1897. Prior to 1894 the limit of death benefits incident to membership was $500. In 1894 there was an attempted change of the constitution increasing the limit of death benefits to $1,000. Under such change the society worked and issued its certificate to W., who paid the dues required thereunder. In 1896 the society again amended its constitution entirely doing away with all existing contracts, and providing for a death benefit of an indefinite sum. W., on request to surrender his certificate, refused to do so, insisting on his rights thereunder. *Held*, that the certificate, issued to W. pursuant to the constitution as it stood after the attempted amendment in 1894, was binding on the parties at the time of the amendment in 1896.

4. A certificate issued to a member of a benefit society provided that the contract stated therein was subject to all existing by-laws, rules, and regulations of the order, *and all that might be made*. *Held*, that such reserve power warranted only those variances required in matters of detail necessary or advisable in carrying out efficiently the fundamental principle or scheme of insurance, not in changing the plan itself and nullifying all contracts entered into under it.

5. An amendment of the constitution of a benefit society, providing that certificates of membership on which members have paid assessments on the basis of a death benefit of $1,000 shall be canceled, and substituting a death benefit indefinite in amount, is not a reasonable variance of the contract with the member, within a reserved power, made a part of the contract of insurance, to make future changes in the rules, by-laws, and regulations of the society.

6. In matters of discipline and policy, not manifestly violating private rights, voluntary associations are supreme and independ-

ent of judicial control, but when they proceed so arbitrarily as to manifestly violate the private rights of their members, they are amenable to the law the same as any other person, natural or artificial.

7. The action of a benefit society in notifying a member, while he yet has ample time to pay his dues, that his certificate would not be recognized as in force, effectively waives further payments so long as such attitude in that regard continues.

8. A by-law of a benefit society providing that, in case of any differences between a member or his heirs and his lodge concerning benefits, the member or his heir should "have the right and the duty to apply to the grand lodge" before commencing action, does not apply where the society denies that the person bringing an action had the right of membership.

9. Compliance with such by-law not being made a condition of a right, but a condition of invoking judicial remedies to enforce a right, is waived by failure to plead it by answer, the complaint being so framed that no opportunity was afforded to take advantage thereof by demurrer.

10. Such by-law, in effect, binding the member or heir, if at all, to submit the controversy to arbitration, compliance therewith is waived by an unqualified denial by the society of all liability.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action to recover on a benefit certificate issued by defendant order to Friedrich Wuerfler, plaintiff being his widow. By the complaint it was alleged, in addition to stating plaintiff's right to maintain the suit if the certificate was in force at Wuerfler's death, that defendant was a society recognized by sec. 2002, Stats. 1898, having a grand grove or lodge with subordinate groves or lodges; that it furnished insurance to its members from about 1894 to 1897 in the sum of $1,000 each, payable ninety days after proof of death, such member being in good standing in the order at the time of his decease; that Wuerfler, for twenty years before he died, which was March 23, 1897, was a member of such order in good standing, and belonged to Walhalla Grove, No. 2; that till about 1895 certificates of membership in the order were not issued; that about that time the custom of issuing certificates com-

menced, and one was issued to Wuerfler, a copy of which is attached to the complaint; that it provided, upon the death of the member in good standing, he having complied with all the laws, rules, and regulations of the order and of the benefit fund, for payment of $1,000 to his widow; that Wuerfler was a member of the order in good standing when he died; that due proof of death was made and all the conditions of the certificate complied with, requisite to entitle plaintiff to the death benefits secured by her husband's membership; but that the order has refused to allow her to participate in the benefit fund of the order, though the time for payment upon the certificate has expired.

Defendant by its answer put in issue the allegations of the complaint as to Wuerfler's being a member of the order in good standing when he died, and alleged that, by the constitution of the order of 1870, it was empowered to insure members for $500 each, payable to the widow or next of kin; that the order had power to amend its constitution, but did not exercise it till 1896; that it then did so, the change taking effect prior to February 4, 1897; that thereby each member of one class was required to pay an assessment of $1 upon the death of any member, and others were required to pay into the benefit fund at such times according to a schedule arranged with respect to ages; that the death benefits in each instance, by the change, were limited to the amount actually paid into the fund on account thereof, not exceeding $1,000, instead of a fixed sum of $500 according to the constitution prior thereto, or $1,000 according to an attempted change in such original constitution made in 1894; that by the constitution as amended, the same as before, if a member failed to pay his assessment by the end of the month in which it was made, such failure *ipso facto* terminated his membership; that Wuerfler made such a default as to three assessments in February, 1897, by reason whereof his membership ceased.

Evidence was produced establishing plaintiff's right to re-

cover either the full amount claimed, being $1,000 and interest, according to the terms of the certificate of membership, or a sum between $462.60 and $511.07, if Wuerfler was a member of the order in good standing at the time of his death, according to the amended constitution. There was evidence that the original plan of the order had no insurance feature; that it was amended in 1870 by adding such feature and limiting the amount of the death benefit incident to each membership to $600; that the limit was changed in 1873 to $500; that there was an attempted change in 1894 increasing the limit to a fixed sum of $1,000, under which change the order worked until the change was made in 1896; that during such time the certificate in question was issued, and Wuerfler paid assessments to the order in accordance with such attempted change for some two years, and all other members did the same, and a large amount was paid out of the benefit fund so accumulated on account of matured memberships; that a change was made in the constitution in 1896 entirely doing away with all existing contracts and providing that all members of the order on January 1, 1897, should, upon the death of a member, pay into the death benefit fund $1, and that all other members on such an occasion should pay into such fund according to a schedule of rates arranged with respect to the ages of the members; that pursuant to such change February 4, 1897, all outstanding certificates and insurance obligations were declared at an end and the insurance feature of the order on the new basis; that prior thereto three assessments were made upon Wuerfler's membership, of eighty cents each, payable before the end of the month of February, 1897; that he refused to surrender his certificate when requested to do so by an officer of the company, insisting upon his rights thereunder; that for nonpayment of such assessments and lodge dues of fifty cents, his name was stricken from the rolls of the order in March, 1897; that the constitution of the order provided a particular

method of amending it, which was not complied with in the attempted change of 1894; that the insurance certificate issued provided that the contract stated therein was subject to all existing by-laws, rules, and regulations of the order, and all that might be made; that prior to Wuerfler's death he was sick for a considerable period of time, during which he was entitled to weekly pecuniary benefits from the order, which were regularly paid up to October 1, 1896; that thereafter he was entitled to $1 per week till he died, unless he waived the same, which defendant claimed was done and attempted to maintain the same by evidence. There was conflicting evidence as to whether Wuerfler directed his sick benefits of $1 per week from October 1, 1896, till he died, to be retained by the order and applied upon any charges there might be upon his membership for assessments on account of the benefit fund and for lodge dues. Evidence of plaintiff in regard to conversations heard by her between her husband and the treasurer of the lodge, to the effect that such benefits should be so retained and applied, and evidence that she, as agent of her husband, instructed such treasurer to so retain and apply such benefits, was rejected.

At the conclusion of the evidence plaintiff moved the court for a directed verdict, which was refused. The jury found specially that Wuerfler did not direct the treasurer of his lodge to retain his sick benefits and to use the same in payment of his assessments and lodge dues. Upon such finding and evidence the court directed verdict for defendant, and judgment was entered accordingly.

For the appellant there were briefs by *Sylvester, Scheiber & Orth,* and oral argument by *Fred. Scheiber.*

For the respondent there was a brief by *Julius E. Roehr,* and oral argument by *L. A. Brunckhorst.*

MARSHALL, J. Did the court err in refusing to direct a verdict for plaintiff, upon the undisputed facts of the case?

That proposition raises the only question that need be discussed on this appeal. It involves though, three minor propositions, which are as follows: (1) Was the certificate or policy of insurance, issued to Wuerfler pursuant to the constitution of the order as it stood after the attempted change in 1894, binding upon the parties at the time of the amendment of 1896? (2) Was the change in 1896, pursuant to which the attempt was made to call in all then outstanding certificates, an amendment of the rules and regulations of the order within the meaning of the certificate in question? (3) Did the failure of Wuerfler to pay the assessments upon his membership and lodge dues, not payable absolutely until the end of February, 1897, affect the validity of his certificate, since before that time such certificate was declared void by the order, and its attitude in that regard continued till such time of payment expired?

1. The first question must be answered in appellant's favor. It is so ruled by the familiar doctrine that when a contract made by a corporation has been so far executed that to allow the corporation to repudiate it would work injustice to the other party thereto, who has in good faith relied thereon, the doctrine of estoppel applies and prevents such repudiation regardless of whether the corporation had a right to make it or not, unless its act in that regard was in violation of some written law of the state or sound public policy; that in such circumstances, if the corporation exceeds its power, it commits a punishable offense against the sovereignty of the people, but cannot itself invoke the doctrine of *ultra vires* to avoid its act, at the same time inflicting a grievous wrong upon the one who has in good faith relied upon the assumption that it possessed in fact the power which it pretended to have authority to exercise. Whether that doctrine should be applied to transactions between benefit societies and their members has been a subject for consideration in many courts, and the decisions in respect thereto are by no

means harmonious. But the weight of authority is clearly in favor of treating such societies substantially the same as ordinary insurance companies and other corporations, as regards their insurance contracts. The subject was fully discussed here in a very recent case. *Ledebuhr v. Wis. Trust Co.* 112 Wis. 657, 88 N. W. 607, where the authorities are collated to considerable extent. We will refer to that case instead of going so soon over the subject again.

2. Respondent did not possess unlimited authority to change its plan of insurance, giving the change retroactive effect, under the reserve power, made a part of the insurance contract, to make changes in the rules, by-laws, and regulations of the order. Such a reserve power is held to warrant only reasonable variances of insurance contracts,—variances required, in the judgment of the order, in those matters of detail necessary or advisable in carrying out efficiently the fundamental principle or scheme of insurance, not changes destroying it. Obviously, changes in the by-laws, rules, and regulations regarding the execution of a plan of insurance are quite different from changing the plan itself and nullifying all contracts entered into under it, as was done in this case. The essential features of the plan of insurance here were that each certificate holder's beneficiary should receive $1,000 upon and at the maturity of his contract, and that a fund should be accumulated by assessments upon the memberships in the order sufficient for that purpose. The way was undoubtedly open for the order to make reasonable changes respecting the hazards members might subject themselves to, and in regard to the number and amount of the assessments, the time of payment thereof, the effect of default in such payment, the notice required of assessments to put members in default, and many other matters of detail that might be mentioned. But after a member had paid assessments for a long period of time, contributing to accumulate money to meet the matured obligations of $1,000 each

to beneficiaries, a change in the constitution of the order (the word "constitution" is here used as synonymous with "by-laws") rendering the certificate at maturity, instead of worth $1,000, worth an indefinite amount and probably not half that sum, cannot seriously be considered a reasonable change in rules, regulations and by-laws as regards existing contracts. Such a change is a complete abrogation of the contract. It was so regarded in this case, as is evidenced by the action of the order formally nullifying all outstanding certificates and calling them in. It was supposed that the order possessed power, without consent of the certificate holders, to declare void the whole plan of insurance, under which it had operated for some two years, during which time many thousands of dollars had been paid into the death fund by members in the expectation that their beneficiaries would ultimately receive each $1,000; and that it possessed such authority either upon the theory that the existing plan was not legally adopted by the order in 1894, or under the reserve power to make retroactive changes in by-laws, rules, and regulations. The right of a benefit society is no broader than that possessed by any other corporation as to making by-laws. The power of every corporation in that regard has its limits, which are at the boundaries of what is reasonable under the circumstances of each case. Though that is determinable, primarily, by the corporation, there is this legal check upon it: If, resolving all fair doubts in favor of its action, the boundaries of reason have been exceeded, to that extent such action is *ultra vires*. *Stafford v. Chippewa Valley E. R. Co.* 110 Wis. 331, 351, 85 N. W. 1036. It is laid down as elementary that attempted changes in insurance contracts between benefit societies and their members, under the reserve power to amend by-laws, rules, and regulations, which are manifestly unfair, are void, it being presumed that in making such reservation both parties contemplated only reasonable variances. Niblack, Ben. Soc. § 25; 1

Bacon, Ben. Soc. § 91*a*. The idea is that the doctrine that vested rights cannot be disturbed by retroactive laws applies to by-laws changing insurance contracts containing the reservation that they shall be subject to future changes in the by-laws, rules, and regulations of the order, society or company, obligated under the contract, to this extent: While, since the contract contains such stipulation, no vested right can grow up under it to be free from such changes, such a right is embodied in the contract as regards unfair variances thereof—those essentially changing the plan of insurance instead of merely changing matters of detail in working out such plan.

Though to a large extent voluntary associations are independent of judicial control, when they proceed so arbitrarily as to manifestly violate the private rights of their members they are amenable to the law the same as any other person, natural or artificial. In matters of discipline and policy not manifestly violating private rights they are as supreme within their own field as a religious society. But when they go beyond that, attempting to nullify their contracts of insurance and to substitute others therefor on an entirely different plan under the guise of changing by-laws, rules, and regulations for the efficient administration of a plan, they cross the line and enter upon a field where the right to proceed may be successfully challenged before judicial tribunals. *Supreme Lodge K. of P. v. Knight,* 117 Ind. 489, 20 N. E. 479.

We apprehend that the action of respondent would not have been taken except upon the theory that all outstanding certificates of insurance issued under the attempted amendment of the constitution of the order in 1894 were void. It was probably supposed, looking to the situation prior to such attempted amendment, under which beneficiaries were entitled to only $500, that the amendment of 1896 would not result in yielding materially less than such sum, and so would not exceed the reserved power. Had the outstanding

certificates been considered valid, we apprehend no attempt would have been made to make such a radical change as to declare them void without consent of the holders, and to substitute contracts of an entirely different character in their places. Our conclusion is that the action of the order, under the circumstances, was manifestly arbitrary and unfair,—one clearly not within the contemplation of the parties to the certificate in question, and an invasion of the vested rights therein.

3. The last proposition is ruled in plaintiff's favor by *Guetzkow v. Mich. Mut. L. Ins. Co.* 105 Wis. 448, 81 N. W. 652. It was there held upon principle and authority that an insurance company cannot be sustained in taking a stand as regards one of its policies which, if maintained, would render a tender of payment thereon by the policy holder useless, because the money would not be accepted as a compliance with the insurance contract, and then successfully plead failure to make such payment as a defense to the policy. The action of respondent in notifying Wuerfler, while he yet had ample time to pay his dues to the order, that his certificate would not be recognized as in force, effectually waived further payments thereon so long as its attitude in that regard continued.

A point is made that the judgment is right irrespective of whether the assignments of error are well taken, because of a by-law of the order which formed a part of the insurance contract, providing:

"In case any differences of opinion arise between any member and his lodge, or between the heirs of a member and his lodge, concerning benefits coming to such member or his heirs, such brother and his heirs shall have the right and the duty to apply to the grand lodge of the state of Wisconsin before he or they commence any action in any court of law."

There are several reasons why that does not affect appellant's right: (1) On its face it does not appear to cover controversies respecting whether a person is or is not a member

of the order. It is confined to controversies within the order as between it and acknowledged members thereof or the heirs of such members. (2) Compliance with it is plainly not made a condition of a right but a condition of invoking judicial remedies to enforce a right; hence such compliance was waived by not complaining of noncompliance by answer, since there was no opportunity, by reason of the way the complaint was framed, to do so by demurrer. *Gatzow v. Buening,* 106 Wis. 1, 81 N. W. 1003. (3) The by-law, in effect, bound the beneficiary, if at all, to submit the controversy as to what her rights were to arbitration, and was waived by the unqualified denial by respondent of all liability under the certificate. 2 May, Ins. 495; Joyce, Ins. § 3257.

The result is that at the close of the testimony appellant was clearly entitled to the direction of a verdict for the amount claimed, less the unpaid assessments, aggregating $2.40, with interest from the maturity of the claim, August 26, 1897, and to judgment accordingly.

By the Court.—The judgment is reversed and the cause remanded for a new trial.

Upon the ground that the facts were undisputed and indisputable, and hence that a new trial was unnecessary, the appellant moved that the direction as to remanding the cause be so changed that the cause should be remanded to the court below either with a direction to enter judgment in favor of the plaintiff for $997.60 and interest from August 26, 1897, or with a direction to proceed according to law.

The motion was denied January 13, 1903.

SCHULTZ, Appellant, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Respondent.

November 12—November 28, 1902.

Railways: Master and servant: Injuries to employee: Negligence: Assumption of risk: Co-employee.

Plaintiff was injured while assisting in unloading a car loaded with lumber. The lumber consisted of a tier of planks along each side of the car, between which lumber of various sizes had been thrown in. The tiers of planks were retained by stakes fitted into sockets along the outer edges of the car. The car was tilted so that one side was lower than the other. While the car was being unloaded, one of the gang of laborers in which plaintiff was working, and in his presence, knocked out the stakes on the lower side of the car, lumber was pushed out over the tier of plank on that side, and a few minutes after the piles on that side fell on plaintiff. *Held*, that a nonsuit was proper, since, if the pile fell from the mere action of physical forces, the conditions were obvious, and assumed by plaintiff, and if from the removal of the stakes, or from pushing lumber over an unsupported pile, the negligence was that of a fellow servant.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action to recover for personal injuries by reason of the fall of certain lumber from a car which plaintiff, a common laborer, was assisting to unload, on May 13, 1899. The car was an ordinary flat car, having upon its floor a number of nails or spikes, described as "sidewalk spikes," driven in so that the heads were still from an inch to an inch and a half above the floor of the car, some of them being lower by reason of being bent over. There was no evidence of the ownership of the car, or by whom loaded. On this car was a quantity of lumber, of which a tier or course of planks between two and three feet high was laid evenly and level along each side of the car, and restrained by upright stakes fitting into sockets along the outer edges. The middle of the car be-

tween these two courses or tiers was filled with indiscriminate lumber thrown in helter-skelter. This condition was obvious from either end of the car. The car was stationed upon a curve, with the ends approximately north and south, and the east side lower than the west. The gang of six men of which plaintiff was one proceeded to unload the car, and, after removing a small quantity of lumber, one of them, in plaintiff's sight, knocked out of place the upright stakes which served to retain the lumber. Plaintiff approached the east side of the car to put in place some skids on which to slide the lumber off, and as he did so the pile of planks on that side tipped over and fell onto him. That pile is described as consisting, first, of a 3x4 set edgeways, and then two 11-inch planks. These planks, as they were piled and lay on the car, were level. None of the witnesses did or, indeed, could testify to any immediate cause for the planks falling over; simply, having been in place at one moment, at another they fell, some five or six minutes after the stakes had been taken out, and after several pieces of lumber had been unloaded over that side. The negligence alleged in the complaint was, first, the presence of the spikes in the floor of the car, and that through negligence of the defendant the lumber was stacked, piled, and loaded so unskillfully and unsafely that by reason thereof and of the said defect in said car the lumber rolled down upon the plaintiff. At the close of plaintiff's evidence the court granted a motion for nonsuit on the ground that the cause of the fall of the lumber was mere matter of conjecture, and that there was no evidence to establish that it was caused by the alleged negligence of the defendant. From judgment thereon plaintiff appeals.

For the appellant there was a brief by *Max W. Nohl,* attorney, and *Ernest Bruncken,* of counsel, and a reply brief signed by *Max W. Nohl,* and oral argument by *Mr. Nohl.*

C. H. Van Alstine, of counsel, for the respondent.

DODGE, J. Plaintiff contends that the fall of the lumber must be ascribed to the presence of the spikes in the bottom of the car; also to the manner in which the lumber was laden upon the car, namely, the promiscuous dumping of indiscriminate lumber loosely between the two tiers lying along the sides; and invokes the rule of *res ipsa loquitur,* declared in this court in *Cummings v. Nat. Furnace Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665; *Stacy v. Milwaukee, L. S. & W. R. Co.* 85 Wis. 225, 54 N. W. 779, and *Carroll v. Chicago, B. & N. R. Co.* 99 Wis. 399, 75 N. W. 176. The principle of those cases is that, where the accident could not well happen unless either the apparatus be defective or be negligently managed, then the accident itself is evidence of one or the other of these causes; and, if defendant be responsible for both condition and management of the apparatus, the accident alone tends to establish defendant's liability, and justifies a verdict. The antithesis to this rule was laid down in *Musbach v. Wis. Chair Co.* 108 Wis. 57, 84 N. W. 36, where the accident might have been due either to a defect in the apparatus, for which defendant would be liable, or to negligence of co-servant, for which he would not. It was there said (108 Wis. 67, 84 N. W. 39):

"With these two possible causes to account for the explosion, the burden of proof, of course, rested on the plaintiff to prove the one for which the defendant would be liable."

In the case before us we have nothing proved but the fact that the lumber fell. It appears that there were spikes, which might or might not tilt the tier of lumber on the east side of the car so as to render it insecure. There is no proof that they did so. Indeed, so far as the evidence goes, it tends the other way, for the only witness on the subject declares that the planks composing this tier were level. Besides this possible cause, there appears, however, the fact that the tier of lumber about two and a half feet high on the lower edge of

a tipping car was subject to outward pressure from the lumber thrown behind and against it; that the loaders of the car had taken precautions against this outward tendency by confining the lumber by upright stakes along the car edge, and that such safeguarding stakes had just been removed in plaintiff's presence, and by his fellow servant; also that certain lumber had already been passed over this exterior tier, with probable tendency to start an outward movement. Here are at least three possible causes for the fall of this lumber other than the mere presence of spikes in the car floor: First, the obvious tendency of physical forces; second, the possibly negligent removal of the stakes, which obstructed such forces; and, third, the possibly negligent act of pushing pieces of lumber over this unsupported wall. For neither of these three could defendant have been liable to plaintiff. Not the first, because all the conditions were open and obvious, and as easily discoverable by plaintiff as by any of defendant's agents; so that, if they constituted a peril to members of the unloading crew, the plaintiff assumed the risk thereof. Not the second or third, because any negligence therein was that of fellow servants. As was pointed out in the *Musbach Case,* it is not enough that plaintiff show that there are several causes, one as probable as another, to warrant the court in submitting to the jury a choice between them. If there is a reasonable possibility that the accident may have been due to a cause other than the alleged negligence of the defendant, it becomes the duty of the court to take the question from the jury, unless there is some evidence other than the mere happening of the accident to establish the efficacy of such negligence. Of that we can find nothing in the present case, and must conclude that the trial court properly performed its duty in declining to submit to the conjecture of the jury which of the several possible causes was the actual one.

By the Court.—Judgment affirmed.

LADD, Appellant, vs. WITTE, Respondent.

November 12—November 28, 1902.

Appeal from justice's court: Affidavit: Pleading: Counterclaim: Cause of action: Same transaction: Appeal and error: Immaterial error: Physician and surgeon: Instructions to jury: Damages: Evidence.

1. To perfect an appeal from a judgment rendered in justice's court, sec. 3754, Stats. 1898, requires that the appellant file with his notice of appeal, an affidavit that the appeal is made in good faith and not for delay. Plaintiff appealed from a judgment rendered against him in justice's court. The affidavit, signed by plaintiff, after naming him, described him as "the above named plaintiff and appellant," alleged that the appeal was in good faith and not for delay, and "that he is the *defendant* above named." That plaintiff was the appellant appeared beyond doubt or controversy from the entire record. *Held*, that the statement that appellant was *defendant* was mere surplusage, and could not serve to neutralize or render ineffective the otherwise complete and sufficient affidavit.
2. A physician brought an action on *quantum meruit* in justice's court for services. After appeal taken, defendant was permitted by the appellate court to amend his answer and plead as a counterclaim a misrepresentation by plaintiff that the medical services were necessary. *Held*, that the counterclaim arose out of the same transaction stated in the complaint, and was properly pleadable.
3. In such case the ruling allowing the amendment, if erroneous, cannot be prejudicial to plaintiff, where the court, at the close of the evidence, withdrew the counterclaim from the jury, and directed them not to consider the same or allow anything thereon.
4. Where the court, in an action on *quantum meruit* for a physician's services, ruled that there was no proof of breach of warranty, and that the only question was the value of the services rendered, it is prejudicial error to give an instruction, in substance, that if plaintiff, as an inducement to be permitted to perform an operation, assured and guaranteed relief or recovery from the operation, and defendant relied thereon, the jury might take those facts and circumstances into consideration in determining the value of the services.
5. In such case the amount of damages demanded was $100, and there was no evidence to support a verdict for less than $50.

Held, that an instruction that if the jury "should be of the opinion that the services were of value to defendant," they must determine the value, under all the credible evidence, at any amount up to $100, is erroneous, as indicating to the jury the existence of evidence to justify a verdict for any sum between zero and $100.

6. In the absence of an express agreement to the contrary, a physician or surgeon who brings to the service rendered due skill and care, earns the reasonable and customary fee therefor, whether the outcome be beneficial to the patient or the reverse.
7. Where in an action on *quantum meruit* for a physician's services, there is no conflict in the evidence of experts as to the reasonable value of the services rendered, the jury cannot disregard the same, and use their own judgment in determining their value.
8. In an action on *quantum meruit* for a physician's services, it is not prejudicial error to refuse to instruct the jury that plaintiff is not precluded from recovering more than $50 by reason of having originally sent his bill for that amount, where the court, in the general instructions, had charged the jury to allow such sum as the evidence proved the value of the service to be, up to $100.

APPEAL from a judgment of the superior court of Milwaukee county: OREN T. WILLIAMS, Judge. *Reversed.*

Plaintiff, a physician and surgeon, brought this action in justice court to recover for services in performing an operation upon the defendant's newly-born imperfect child, alleging such services to be reasonably worth $50. After judgment in favor of the defendant, and appeal by plaintiff to the superior court, he was permitted to amend "so as to make his claim $100 and interest." Defendant was permitted to amend his answer by adding a counterclaim for $5,000, based on allegation of representations by plaintiff that operation was necessary and would succeed; that in fact it was unnecessary and improper; and that by reason thereof, and of plaintiff's neglect to properly care for the child thereafter, death resulted. The defensive part of the answer was a general denial, and the assertion that the plaintiff promised and agreed to perform a successful operation, but did per-

form it in such negligent and careless manner that the child immediately died. After the completion of the evidence in superior court it was ruled that there was no evidence to support the counterclaim, nor to prove any defense to plaintiff's cause of action; whereupon the amount thereof was submitted to the jury, who returned a verdict of $35. A motion to set aside the same and for new trial was made by the plaintiff on the ground of inadequacy of the amount, and for errors in admission of evidence and in instructing the jury, which being overruled, judgment was entered in plaintiff's favor for the amount found, with costs, from which plaintiff brings this appeal.

J. A. Eggen, for the appellant.

For the respondent the cause was submitted on the brief of *Doerfler, McElroy & Eschweiler.*

DODGE, J. The respondent objects to the jurisdiction of this court by reason of a failure of jurisdiction in the circuit court over the appeal from the justice of the peace. The objection is that such appeal was ineffectual because of the affidavit of good faith, which was in the following words:

"*G. D. Ladd,* the above-named plaintiff and appellant, being duly sworn, on oath says that the appeal in the above-entitled action is made in good faith, and not for the purpose of delay, and that he is the *defendant* above named."

That affidavit was signed and sworn to by *Mr. Ladd,* the appellant. The objection is without force. The statute (sec. 3754, Stats. 1898) requires merely that the appellant, or some person authorized by him, must file with the notice an affidavit that the appeal is made in good faith, and not for delay. That *Ladd* was the appellant appeared beyond doubt or controversy from the entire record. The statement that he was defendant was mere surplusage (*Nett v. Serwe,* 28 Wis. 663), and could not serve to neutralize or render ineffective the otherwise complete and sufficient affidavit.

The first error assigned is in permitting the defendant to amend answer by adding the counterclaim. We discover no error in this ruling; certainly not to the extent of abuse of the discretion vested in the trial court. The counterclaim arose out of the same transaction as did the cause of action stated in the complaint, and, under sec. 2656, Stats. 1898, was properly pleadable. In any event, however, such ruling cannot have affected the judgment prejudicially to the plaintiff, for at the close of the evidence the court withdrew the counterclaim from the jury, and directed them not to consider the same or allow anything thereon.

2. Plaintiff assigns as error the giving of several instructions to the jury, namely:

(a) "If you find . . . that the plaintiff, . . . as an inducement to be permitted to perform the operation for the defendant, assured or guaranteed relief or the recovery of the infant from that operation, and that the defendant relied upon such statement, . . . you may take those facts and circumstances into consideration in determining the value of the services."

This instruction evinces such confusion of ideas as is sometimes ascribed to juries, but seems hardly possible to the judicial mind. The slightest reflection makes apparent that the only effect of breach of either a fraudulent or innocent warranty inducing the making of a contract of employment and payment *quantum meruit* is to defeat any recovery whatever thereon, except where made the basis of recoupment or counterclaim against an agreed price. It could have no possible effect to make either greater or less the actual market value of the service in fact performed. The court had already decided that there was no proof of either broken warranty or unskillfulness and negligence to defeat recovery *quantum meruit,* and that the only question for the jury was the reasonable value—i. e., customary price—for performing the operation. The quoted instruction invited the jury into that field of meretricious compromise of convictions for dam-

ages authorizing them to commute a doubt as to plaintiff's right of recovery into a diminution of the amount to which he had absolute legal right, if he recovered at all. If this instruction guided the jury at all, it necessarily guided them to injustice,—to awarding an amount other than the true reasonable value of the service rendered by plaintiff. Prejudicial error therein is obvious.

(b) "In case you should be of the opinion that the services of the plaintiff were of value to the defendant, you must determine the value of such services, under all the credible evidence in the case, at any amount up to the amount of $100.00."

While the direction to determine the value of the service upon all the evidence is correct, and is unassailed, appellant complains of the expression, "at any amount up to the amount of $100.00," as indicating to the jury that there existed evidence to justify any sum between zero and $100; while, as he contends, there was no evidence to support any finding less than $50. We think the instruction not necessarily obnoxious to this criticism. The court may be understood to mean any amount having support from evidence, and, so construed, the duty of the jury was accurately expressed. A cautionary phrase to such effect might well have been added to assure a right understanding by the jury, but we cannot think its omission reversible error. The hypothesis on which this instruction is predicated, viz., "in case you should be of the opinion that the services of the plaintiff were of value to the defendant," is most unfortunate, and misleading. It certainly tended to confine the jury to consideration of what and how much benefit resulted to the defendant from this fruitless incision into the body of his new-born child, whose death was certain without the operation, but equally occurred, it notwithstanding. That is not at all the test. So that a surgical operation be conceived and performed with due skill and care, the price to be paid therefor does not depend on the result. The event so generally lies with the forces of

nature that all intelligent men know and understand that the surgeon is not responsible therefor. In absence of express agreement, the surgeon who brings to such a service due skill and care earns the reasonable and customary price therefor, whether the outcome be beneficial to the patient or the reverse. Plaintiff requested a direct and plain instruction that the jury must be guided solely by the evidence relating to the value of services. It was error to incumber such direction by the hypothesis just discussed.

(c) In connection with the last considered instruction, plaintiff complains of another, not very clearly assigned as specific error, though the subject of due exception, which is likely to be important upon another trial, and ought not to pass without consideration. It is as follows:

"The opinions of experts as to the value of the services of the plaintiff are not conclusive upon you. Such opinions are advisory only. You must, in the end, use your own judgment in determining the value of the services, guided by the credible evidence in the case, and assisted by opinions of the experts."

This instruction is not without apparent support from certain language contained in the opinion in *Moore v. Ellis,* 89 Wis. 108, 61 N. W. 291, but it is in direct contradiction of what was decided in the later case of *Wurdemann v. Barnes,* 92 Wis. 206, 207, 66 N. W. 111, where the court held that, there being no evidence of value of a physician's services except his own, no question thereon for the jury existed. The same proposition was decided in *La Chappelle v. Warehouse & B. S. Co.* 95 Wis. 518, 526, 70 N. W. 589, where an expert having testified to a certain value, and no other evidence having been given, it was held that the trial court rightly instructed the jury to adopt that value. This seeming conflict between our own decisions largely disappears, however, upon a full understanding of the situation to which was applied the language used in *Moore v. Ellis.* There the evidence had taken a wide range, and there was extreme divergence be-

tween the opinions of witnesses, and considerable dispute as to the facts constituting the true hypothesis upon which such opinions should be based. It appeared that the plaintiff's professional services were largely in the way of collection of indebtedness and enforcement of mortgages, as to some of which it was claimed that he had made the loans and received a commission therefor from the borrower. Some of plaintiff's experts fixed his reasonable compensation at ten per cent. upon all sums collected. Some of defendant's experts testified to a customary charge of one per cent., and many of them that no charge at all was customary for collecting in loans on the making of which a commission had already been received by the attorney. So that the remarks in the opinion as to the mere advisory force of expert evidence of value, if undisputed, were wholly *obiter,* and must be considered as the expression merely of the writer of the opinion, and not as an authoritative decision of the court. Two antithetic decisions of the supreme court of Michigan are instructive. The first—*Wood v. Barker,* 49 Mich. 295, 13 N. W. 597—was closely identical in its facts with the case at bar. It was a suit for compensation *quantum meruit* by a consulting surgeon, the value of whose services was testified to by himself and the general practitioner whom he aided. No evidence of other experts was offered, nor was there any substantial conflict as to the character of his services, or the circumstances under which they were rendered. The court there said:

"There can be no presumption of law concerning the value of a surgeon's services, and there is no presumption that a jury can ascertain it without testimony of some kind from persons knowing something about such value. . . . We can see no sufficient reason for the suggestion that all of this [expert] testimony might be disregarded, and there is no rule which would allow the jury to entirely ignore the testimony, and at the same time to form an independent conclusion without testimony upon a matter which required proof

beyond their conjectures or their opinions. . . . There can be no safety to any one if juries are to use their own unguided views on such matters."

In *Walbridge v. Barrett,* 118 Mich. 433, 76 N. W. 973, there was presented an action for attorney's fees in conducting a suit for personal injuries. There it was held error to refuse an instruction quite similar to that given in the present case. The court said:

"Had there been no testimony of the value of plaintiff's services aside from that of the attorneys, the case would undoubtedly have been ruled by *Wood v. Barker,* 49 Mich. 295, 13 N. W. 597; but there was other evidence bearing upon the value of the services. [Reciting rendition of bills, agreements as to per diems, and conflicting proof of details of the work done.] Under these circumstances the rule in *Wood v. Barker* was not applicable, and the court should have instructed the jury that the opinions of the attorneys were not conclusive."

In line with this latter case and with the real decision in *Moore v. Ellis,* 89 Wis. 108, 61 N. W. 291, are the cases of *Head v. Hargrave,* 105 U. S. 45, and *The Conqueror,* 166 U. S. 110, 132, 17 Sup. Ct. 510. In those cases it is pointed out that the testimony of experts was, at the best, not to the fact of value, but to the fact of their opinions, and therefore that the fact of value is one to be deduced by the jury from the various evidentiary facts presented before them, inclusive of the fact that certain expert persons have certain opinions thereon. In the absence of such conflicting evidentiary facts, however, there seems to be no answer to the logic of *Wood v. Barker* that jurymen, as such, have no presumptive knowledge upon the subject of the value of professional services, and must be guided by the evidence offered upon the trial, and consequently are not at liberty to disregard the same and enter the field of their own uninstructed conjecture. That view seems to have been tacitly adopted by this court in the two cases above cited,—*Wurdemann v. Barnes,* 92 Wis. 206,

66 N. W. 111; and *La Chappelle v. Warehouse & B. S. Co.* 95 Wis. 518, 70 N. W. 589. Such rule is not in conflict with another doctrine, laid down in *Remington v. Eastern R. Co.* 109 Wis. 154, 162, 84 N. W. 898, 85 N. W. 321, that upon trials to the court the opinions of experts as to the value of professional services of lawyers are never conclusive, for the reason that the judge himself has personal expert knowledge on the subject,—a principle recognized and applied in *Speiser v. Merchants' Exch. Bank,* 110 Wis. 506, 523, 86 N. W. 243, *Richardson v. Tyson,* 110 Wis. 572, 588, 86 N. W. 250, and other cases. The present case is clearly within the class of *Wurdemann v. Barnes, La Chappelle v. W. & B. S. Co.,* and *Wood v. Barker,* for there was no evidence whatever in conflict with that of the two physicians—one disinterested—that, in their opinion, the customary and reasonable value of the services rendered exceeded $50. True, those witnesses testified that, in their opinion, the value exceeded $100, but in that respect there may be said to have been conflict, for their previous testimony indicated that at another time they believed it to be less, but never less than the $50. Following, therefore, the precedents of our own cases, and adopting the reasoning of *Wood v. Barker,* we cannot avoid the conclusion that the instruction given was erroneous, and should not be repeated upon a new trial. Whether appellant's method of presenting his case has been such as to preclude a reversal on this ground need not be decided, since that results in any event for other reasons already stated.

3. Error is also assigned upon refusal of several of plaintiff's requests for instruction. These either were sufficiently covered by the general charge, or were not justified by the evidence, except, perhaps, the fourth, which was to the effect that plaintiff was not precluded from recovering more by reason of having originally sent his bill for but $50. Such instruction would, of course, have correctly stated the law, and might well have been given to assure full understanding by

the jury. We cannot say, however, that its refusal was reversible error, for technically it is covered by the instruction to allow such sum as the evidence proved the value of the services to be up to $100.

By the Court.—Judgment reversed, and cause remanded for a new trial.

KOEPKE, Respondent, vs. WINTERFIELD, Appellant.

November 12—November 28, 1902.

Deeds: Covenant of seisin: Breach: Cause of action: False representations: Pleading: Joinder of causes of action.

1. In an action against a vendor for breach of his covenant of seisin the complaint, among other things, alleged that the vendor never had possession, actual or constructive, of the land conveyed, nor any title or interest therein, and that other persons named had the title in fee simple and lawful right to the land under recorded tax deeds. *Held*, that a cause of action for breach of the covenant of seisin was stated, although tax deeds do not always divest the title of the original owner.
2. In such case where the cause of action alleged is not for rescission of the conveyance, but for damages for breach of the covenant of seisin, the plaintiff need not allege a reconveyance or an offer to reconvey the land.
3. Where a complaint attempts to state two causes of action, and the facts in either are insufficient to constitute a good separate cause of action, a demurrer will not lie for misjoinder.
4. In an action against a vendor for false representations in the sale of land, the complaint, among other things, alleged that the representations as to title were made with intent to defraud the plaintiff; that she, relying thereon, conveyed her house and lot to defendant in exchange for the land, and that the vendor knew, at the time, of outstanding tax deeds, ownership and title. *Held*, that the pleading stated facts sufficient to constitute a cause of action for damages for the alleged fraud.
5. Under sec. 2647, Stats. 1898, providing that plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable, or

both, where they arise out of the same transaction, or transactions connected with the same subject of action, an action against a vendor for breach of his covenant of seisin may be joined with an action against him for false representations in the sale of the same land.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an appeal from an order overruling a demurrer to the complaint alleging two causes of action. The first cause of action is to the effect that in consideration of the conveyance of a house and lot, described, to the defendant (with an incumbrance thereon), of the value of $800, the defendant executed, acknowledged, and delivered to the plaintiff a warranty deed, with full covenants, of 160 acres of land, described, January 15, 1901; that the land was at the time wild and unoccupied, and the defendant was not and never had been in the actual or constructive possession thereof, and had no title nor interest in or to the same or any part thereof, but, at the time of the execution and delivery of such deed, the title and possession of the land and every part thereof was vested and held and owned by other parties, as therein alleged; that the defendant had full knowledge of the existence of such outstanding title and possession at the time he so in form conveyed to the plaintiff, and that, by reason of the facts stated, the plaintiff had suffered damages in the sum of $800, for which amount, with interest from January 15, 1901, judgment is demanded. The second cause of action alleged is to the effect that the defendant obtained from the plaintiff the deed of the house and lot mentioned by falsely and fraudulently representing to the plaintiff that he was the owner of, and had the title in fee simple to, the 160 acres of land described, that the same was of the value of $800 when in fact its value did not exceed $150, and that the same was free and clear from all incumbrances. That the plaintiff, relying upon and believing such representations to be true, conveyed the house and lot to the defendant, and received in

exchange the said warranty deed of the 160 acres mentioned. That the defendant was not at the time the owner in fee simple of the 160 acres of land, and had no title thereto nor interest therein, but that the title thereof was January 15, 1901, in the parties named in the other cause of action, and had been for more than two years; and further reiterated the allegations of the first cause of action, and alleged damages to the plaintiff in the sum of $800, and prayed judgment for that amount, with interest from January 15, 1901.

The demurrer to the complaint is based upon the following grounds: (1) That several causes of action have been improperly united; (2) that the first cause of action alleged does not state facts sufficient to constitute a cause of action; (3) that the second cause of action stated does not state facts sufficient to constitute a cause of action; (4) that the complaint does not state facts sufficient to constitute a cause of action.

For the appellant the cause was submitted on the brief of *Nye & Mock.*

F. W. Houghton, for the respondent.

CASSODAY, C. J. Nothing need be said as to the fourth ground of demurrer. The complaint only attempts to state two separate causes of action. There is no pretense that the complaint, as a whole, states any other cause of action.

2. The contention that the facts alleged are insufficient to constitute a cause of action for a breach of the covenant of seisin is without foundation. The fact that tax deeds do not always divest the title of the original owner is without significance, since it is alleged that the defendant never had the actual or constructive possession, nor any title nor interest in the land, and that the other persons named had the title in fee and lawful right to the land under recorded tax deeds. The defendant further contends that the allegations fail to state a cause of action because it is not alleged that the plaint-

iff has reconveyed or offered to reconvey to him the land described in the deed to the plaintiff. The alleged cause of action is not for rescission of the conveyance, but for damages for the breach of the covenant of seisin. In such an action, it is said by a standard text-writer:

"As respects the pleadings in an action upon this covenant, it has been settled from an early period that in assigning the breach of the covenants for seisin and of good right to convey it is unnecessary to do more than negative the words of the covenant generally." Rawle, Covenants (5th ed.) § 61.

"As a consequence of this, it is well settled that in an action on the covenant for seisin it is unnecessary either to aver an eviction in the declaration or lay any special damage." Id. § 62.

It was held by this court long ago:

"In an action for a breach of covenant of seisin, the burden is upon the defendant to show his title, and not upon the plaintiff to show the want of it." *Beckmann v. Henn,* 17 Wis. 412; *Mecklem v. Blake,* 16 Wis. 102.

So this court has since held:

"If a grantor assumes to convey with full covenants of warranty unoccupied lands to which he has no title, there is at once a constructive eviction of the grantee which entitles him to the same remedies that he would be entitled to had he been turned out of the actual possession of the land by legal process." *McInnis v. Lyman,* 62 Wis. 191, 194, 22 N. W. 405, 406. To the same effect, *Nichol v. Alexander,* 28 Wis. 118; *McLennan v. Prentice,* 77 Wis. 124, 128, 45 N. W. 943; *Wallace v. Pereles,* 109 Wis. 316, 323, 85 N. W. 371.

We must hold that the facts alleged are sufficient to constitute a cause of action for the breach of the covenant of seisin.

3. If, as contended by the defendant, the second cause of action fails to allege facts sufficient to constitute a cause of action, then there is no ground for claiming that several causes of action have been improperly united. It is only where the complaint states two or more good causes of action that a demurrer will lie for misjoinder. *Bassett v. Warner,*

23 Wis. 673; *Truesdell v. Rhodes,* 26 Wis. 215; *Willard v. Reas,* 26 Wis. 540; *Lee v. Simpson,* 29 Wis. 333; *Schiffer v. Eau Claire,* 51 Wis. 385, 8 N. W. 253; *Hiles v. Johnson,* 67 Wis. 517, 30 N. W. 721. But we are constrained to hold that the second cause of action does allege facts sufficient to constitute a cause of action for damages for the alleged fraud. It is alleged that the false representations were made with intent to defraud the plaintiff, and that she, relying thereon and believing the same to be true, conveyed her house and lot to the defendant, and that the defendant knew at the time of such outstanding tax deeds and ownership and title.

4. The remaining question is whether the two causes of action are improperly united. The statute declares that "the plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable, or both, where they arise out of: (1) the same transaction or transactions connected with the same subject of action." Sec. 2647, Stats. 1898. It is very clear that the two causes of action both arose out of the same transaction,—the exchange of the house and lot for the wild and unoccupied land. The case comes within the principle of the recent rulings of this court, wherein it was, in effect, held that "a cause of action for the wrongful withholding of leased premises after notice of intention to quit, . . . and a cause of action for the wrongful conversion of personal property included in the same lease, by failure to deliver it to the lessor as therein provided, may be joined, . . . since they 'arise out of the same transaction or transactions connected with the same subject of action.' " *Alliance E. Co. v. Wells,* 93 Wis. 5, 66 N. W. 796, as explained in *State ex rel. Alliance E. Co. v. Helms,* 101 Wis. 280, 283, 284, 77 N. W. 194; *Endress v. Shove,* 110 Wis. 133, 139, 85 N. W. 653. We must hold that the two causes of action were properly united.

By the Court.—The order of the circuit court is affirmed.

LEEMAN, Respondent, vs. McGRATH, Appellant.

November 12—November 28, 1902.

Malicious prosecution: Garnishment: Abuse of process: Special verdict.

1. In an action for damages for an alleged malicious garnishment of plaintiff's wages, the special verdict failed to contain a finding of malice, or of want of probable cause. *Held*, that the verdict was insufficient to sustain a judgment for plaintiff.
2. A., honestly believing B. was indebted to him, in order to evade the exemption laws of Wisconsin, assigned the account to C. for the purpose of sending it to another state for collection by garnishment. Thereafter garnishment was unsuccessfully attempted. Such assignment was made before ch. 57, Laws of 1893, prohibiting such an assignment, went into effect. *Held*, that such facts were insufficient to show actionable abuse of process.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This is an action to recover damages for an alleged malicious garnishment of the plaintiff's wages in the state of Iowa. There is no bill of exceptions. The case was tried before a jury, and the following special verdict rendered:

"(1) Did the defendant, being a resident of Milwaukee, Wisconsin, on or about the 18th day of August, 1892, deliver to the Northwestern Collection Agency, for collection, a bill against the plaintiff for $15.35? A. (by direction of court). Yes. (2) Did the defendant subsequently, at the suggestion of said collection agency, assign said bill to one Webster? A. (by direction of court). Yes. (3) Was said assignment made with the understanding and agreement that said assignees or some other person, who collected said bill, or attempted to do so, by taking the same to Sioux City, Iowa, bringing suit thereon, and garnishing the C., M. & St. P. R. R. Co. on account of wages due from said company to said

plaintiff, whether the same are exempt from seizure and garnishment under the laws of Wisconsin or not? A. Yes. (4) Was the plaintiff at that time a married man, and the head of a family, in the state of Wisconsin? A. (by consent of counsel). Yes. (5) If you answer the last interrogatory in the affirmative, did the defendant know that plaintiff was a married man, and the head of a family, in the state of Wisconsin? A. (by consent of counsel). Yes. (6) If you answer the third interrogatory in the affirmative, did one McMillan, an agent, employee, or assignee of said collection agency, bring suit upon said bill, and attempt to garnish the C., M. & St. P. R. R. Co. in his own name, but for the benefit of the defendant in whole or in part? A. Yes. (7) Was said suit and garnishment brought on for trial before the justice of the peace in whose court said suit and garnishment was pending, the plaintiff being present, and defending said suit and garnishment, and did the plaintiff prevail upon said trial, and was said garnishment dismissed and dropped? A. (by consent of counsel). Yes. (8) In whosesoever name said suit and garnishment was entitled, were the same instituted and prosecuted for the benefit of the defendant in this action, in whole or in part? A. Yes. (9) Were said assignments, one or more, executed for the purpose of garnishing the C., M. & St. P. R. R. Co., by reason of its indebtedness to the defendant [the plaintiff in this action], by way of evading and avoiding the exemption laws of the state of Wisconsin as to wages due to a married man and the head of a family in the state of Wisconsin? A. Yes. (10) In what sum do you assess the plaintiff's damages by reason of said attempted evasion and avoidance of the exemption laws of the state of Wisconsin, in relation to his wages due from said railroad company, he being a married man and the head of a family, and the sending of such claim to Sioux City, Iowa, for collection? A. $200.00. (11) Was the plaintiff actually indebted to the defendant in the sum of $15.35, or in any other sum, at the time of the commencement of said suit and garnishment? A. No. (12) If you answer the last interrogatory in the negative, did the defendant honestly believe and suppose that the plaintiff was honestly indebted to him for the amount claimed, and sought to be recovered in and by suit and garnishment? A. Yes."

Upon this verdict judgment was rendered for the plaintiff for the damages found by the jury, with costs, and the defendant appeals.

For the appellant there was a brief by *J. W. Wegner,* attorney, and *Leo Torbe,* of counsel, and oral argument by *Mr. Torbe.*

For the respondent the cause was submitted on the brief of *H. L. Buxton,* attorney, and *K. Shawvan,* of counsel.

WINSLOW, J. The verdict is very plainly insufficient to sustain any judgment in favor of the plaintiff. It does not show a cause of action for malicious prosecution, because neither malice nor want of probable cause is found.

The respondent claims that it shows actionable abuse of process, but this claim is equally untenable. It simply shows that the defendant, honestly believing that the plaintiff owed him a small account, assigned the account to another at some time after August 18, 1892, for the purpose of sending the same to Iowa for collection by garnishment in order to evade the exemption laws of Wisconsin, and that such garnishment was thereafter unsuccessfully attempted. These facts do not show actionable abuse of process. In the absence of some statutory prohibition, or the express inhibition of a court of equity, the defendant has a legal right to assign the claim to another, and send it to another state for the purpose of bringing garnishment proceedings in that state for the very purpose of securing the advantage afforded by the exemption laws of Iowa. This was the privilege that was open to him in common with all citizens of the United States. *Harwell v. Sharp,* 85 Ga. 124, 11 S. E. 561, 8 L. R. A. 514. There was no statute in this state forbidding such a proceeding until the passage of ch. 57, Laws of 1893 (Stats. 1898, sec. 4438*f*), which went into effect March 29, 1893. Whether the violation of this statute alone would constitute an actionable wrong for

which damages could be recovered in a civil action is a question we do not have to consider, as the complaint alleges that the assignment of the claim was made before the 1st day of March, 1893, and that thereupon the claim was taken to Iowa for the purpose of collection by action. There is no finding in the verdict which contradicts this allegation; hence it stands as a fact in the case that all the acts which are denounced by ch. 57, Laws of 1893, as unlawful, occurred before that act went into effect. In *Griggs v. Docter,* 89 Wis. 161, 61 N. W. 761, it was held that a court of equity might properly enjoin an attempt to evade the exemption laws of this state by the prosecution of garnishment proceedings in a foreign state against one of our own residents. This principle, however, is of no avail here. A court of equity enjoins the commission of many acts for the commission of which a court of law could give no damages.

By the Court.—Judgment reversed, and action remanded with directions to render judgment upon the verdict for the defendant.

IN RE ECKHART'S ESTATE: GOLLUSCH, Appellant, vs. HEIDEMANN, Respondent.

November 12—November 28, 1902.

Appeal and error: Record: Bill of exceptions: Questions reviewed.

On appeal to the circuit court from an order of the county court denying application for construction of a will, the order of the circuit court, affirming that of the county court, recited that it was based not only upon the files and proceedings, but upon proofs submitted in the matter. There was no bill of exceptions. *Held,* that the order of the county court was not presented for review by the appeal to the supreme court from the order of the circuit court.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

One *Henry Gollusch,* having been appointed administrator of the estate of Edna Eckhart, deceased, in the county court for Milwaukee county, presented to that court in that estate a petition reciting a somewhat intricate relationship of said Edna to one John Pieckel, and consequent descent or inheritance from him; that said Pieckel left a will, which was in process of probate and execution in said court; that, although the estate of said John Pieckel was ready for distribution and final settlement, the same could not be made, because one *William Heidemann,* the grandfather of said Edna, disputes the true and proper construction of said will, and the rights and interest of the father of said Edna Eckhart therein,—wherefore he prayed that said will might be construed by the court, and the interests of the several claimants thereto determined and adjudged, and the same be assigned to such persons as by law and said will are entitled to the same. The county court entered an order denying said application without prejudice, stating that, after hearing counsel on both sides, said court was satisfied that the matter had been disposed of, and that said will had already been construed by that court by its decision on file, dated February 1, 1900, signed by J. M. PERELES, judge, presiding. That decision was in the form of an opinion filed by the then county judge at the time of deciding the application for administration, and is claimed to constitute a complete construction of John Pieckel's will. The said administrator, *Henry Gollusch,* thereupon appealed to the circuit court of Milwaukee county, whereupon was entered an order reciting the appearance of counsel for several persons, and declaring: "Now, therefore, upon motion of Fiebing & Killilea, attorneys for said contestant, based upon the record, pleadings, files, and proceedings, and upon the proofs submitted in

said matter," the said order of the county court should be affirmed. From that order the present appeal was brought. There is no bill of exceptions, and the record contains nothing transpiring in circuit court except said order and the record as transmitted by the county court, which included the order of that court appealed from, a paper indorsed "Copy of last will of John Pieckel," and a copy of the opinion of Judge PERELES, dated February 1, 1900, together with the petition for construction, the order denying the same, and the proper appellate papers.

For the appellant there was a brief by *W. B. Rubin,* attorney, and *Franklin F. Orth,* of counsel, and oral argument by *Mr. Rubin.*

For the respondent there was a brief by *Fiebing & Killilea,* and oral argument by *O. J. Fiebing.*

DODGE, J. Upon the appeal from county court to circuit court the whole matter was presented for a trial *de novo.* That such trial involved consideration of matters other than those presented by the record sent up by the county court is rendered apparent by the very order appealed from, which recites that it was based not only on the files and proceedings, but upon proofs. Under some circumstances of evidence—such, for illustration, as that the county court, in the matter of the will of John Pieckel, the proper and natural place for its construction, had already fully construed his will, and entered a final order of distribution; or, indeed, that it was about to do so—it would be entirely proper for the court to decline to enter into a consideration of the construction thereof in this, a different estate and proceeding. Whether such evidence was or was not offered we, of course, cannot know without a bill of exceptions. Since it was possible that the proofs might have disclosed a situation warranting the circuit court in refusing to enter upon the construction of John Pieckel's will on this petition, we must assume that

such evidence existed, in the absence of any bill of exceptions (*In re Ogle's Estate,* 97 Wis. 56, 72 N. W. 389), and cannot feel called upon to decide whether the reasons assigned by the county court for its decision were valid or not. That order is not the one under review.

By the Court.—Judgment affirmed.

RITTER, Respondent, vs. BRUSS, imp., Appellant.

November 12—November 28, 1902.

Promissory notes: Suretyship: Married women: Separate estate: Admission binding wife's estate: Estoppel.

1. Where a married woman signs her husband's note, the payee having had no communication or negotiation with the wife, and the loan being negotiated for use by the husband in his own business, a memorandum beneath the signatures on the note, signed by the wife,—"The above note is made for the benefit of my separate estate and I hereby charge it with the payment thereof"—will not sustain a judgment against the wife, unless it be shown that the transaction was necessary and convenient for the use and enjoyment of her separate estate, or the carrying on of her personal business, or in relation to her personal services.
2. In such case it is error to exclude testimony tending to establish allegations of the wife's answer, to the effect that she signed the note as surety for her husband and that the transaction did not concern her separate property, earnings or personal services.
3. An action at law on a promissory note cannot be maintained against a married woman where the evidence fails to show that she possessed any separate estate.
4. Plaintiff loaned A. money and, after delivery of the money, took a note, signed also by A.'s wife, without having had any negotiations or communications with her as to the matter. The wife signed a memorandum at the foot of the note stating it was for her benefit and that she charged her separate estate with payment. The memorandum did not express any consideration. *Held,* that such memorandum did not estop the wife from setting up the defense that she was a mere surety.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

Action on a joint and several promissory note, dated June 10, 1895, due one year after date, for $2,000, payable to plaintiff, with interest at five per cent., payable semi-annually, signed by Julius Bruss and *Wilhelmine Bruss.* Immediately following the signatures appears this statement:

"The above note is made for the benefit of my separate estate, and I hereby charge it with the payment thereof.

"WILHELMINE BRUSS."

The complaint sets out the note at length, and contains proper allegations showing default in payment. The defendant Julius answered separately, claiming a discharge in bankruptcy. The defendant *Wilhelmine* answered, admitting the execution of the note, but alleged that at the time she executed it she was the wife of the defendant Julius, and signed the note solely as surety for him for his antecedent debt; that the note was not given, nor was it necessary or convenient, for the use or enjoyment of her separate estate or business, and did not relate to such estate or business, or to her personal service, all of which was well known to the plaintiff. On the trial the plaintiff introduced the note, and computed the interest thereon, and rested. Plaintiff was called as a witness for defendant, and testified that the loan was negotiated by the defendant Julius, who said he "needed it for taxes, insurance, and something else," and that he paid the money over to him. The defendant Julius testified that the other defendant was his wife when the note was given, and that it was given for his debt. *Mrs. Bruss* testified that she never had any communication with plaintiff regarding the loan. Considerable testimony offered by the defendants was ruled out on the ground that it tended to contradict or vary the terms of the note. At the close of the testimony, the court directed a verdict for plaintiff. Due exceptions were taken by defendants. A motion for a new trial was denied, and

judgment entered against the defendant *Wilhelmine,* from which she has taken this appeal.

For the appellant there was a brief by *Sheridan & Wollaeger,* and oral argument by *James A. Sheridan.*

For the respondent there was a brief by *Sylvester, Scheiber & Orth,* and oral argument by *C. A. Orth.*

BARDEEN, J. The evidence shows that the loan for which the note in suit was given was negotiated by the defendant Julius for use in his own business; that the plaintiff had no communication or negotiation with the wife, and knew that she was not interested in getting the money. The answer of the wife set up that she executed the note as surety for her husband, and that the transaction did not concern her separate property or earnings. The court promptly ruled out all testimony offered by the defendants tending to prove this defense. Such ruling was distinctly erroneous. It was competent for the defendants to show that plaintiff knew when the note was executed that the wife signed merely as surety. *Riley v. Gregg,* 16 Wis. 666; *Irvine v. Adams,* 48 Wis. 468, 4 N. W. 573. See *Omaha Nat. Bank v. Johnson,* 111 Wis. 372, 87 N. W. 237. It was also competent for the defendants to show that, as to the wife, the transaction did not concern her separate property or business or personal services. This has been permitted in so many cases that to cite them all would merely incumber the record. See *Mueller v. Wiese,* 95 Wis. 381, 70 N. W. 485; *Hollister v. Bell,* 107 Wis. 198, 83 N. W. 297; *Kavanagh v. O'Neill,* 53 Wis. 101, 10 N. W. 369. When it appeared by the evidence that the defendant *Wilhelmine* was a married woman, and that the debt represented by the note was the husband's, there could be no recovery against her in an action at law, unless it was shown that the transaction was necessary and convenient for the use and enjoyment of her separate estate, or the carrying on of her separate business, or in relation to her personal services.

Mueller v. Wiese, 95 Wis. 381, 70 N. W. 485; *Gallagher v. Mjelde,* 98 Wis. 509, 74 N. W. 340; *Hollister v. Bell,* 107 Wis. 198, 83 N. W. 297; *Stack v. Padden,* 111 Wis. 42, 86 N. W. 568. As stated in the case last cited:

"It is not sufficient that a married woman shall merely make a contract *intending* to charge her separate property. It must concern her separate property or business or personal services."

We cannot account for the ruling of the trial court, unless it be that he was of opinion that the memorandum at the foot of the note, signed by the defendant *Wilhelmine,* rose to the dignity of a contract, and could not be disputed. But, as will be observed, the memorandum is not a contract. It utterly fails to express any consideration. It is, at best, a mere admission of intention. It did not, in law, bind the wife, because it lacked the essential attributes mentioned, and a showing that it concerned her special property. The complaint failed to show any foundation for its enforcement. While it is true that it was held in *Smith v. Dunning,* 61 N. Y. 249, it was unnecessary to allude in the complaint to her coverture or her separate estate, still, when the evidence in defense shows coverture, there must be further proof of separate estate, and intent to charge it, before there can be a recovery at law. This court, however, seems to have covered this question in *Rogers v. Weil,* 12 Wis. 664. The action was to foreclose a mortgage securing a bond, signed by husband and wife. The complaint showed that the parties were such, and upon default a judgment of foreclosure and sale was rendered, and, upon a deficiency being reported, a judgment therefor was entered against both defendants. Upon appeal by the wife, this court said:

"Still, at best, we all think that a party ought not to have a personal action upon a contract made by a married woman during her coverture, without showing in the complaint that the contract related to her own separate property, and was

one upon which she might become liable to a personal judgment. This not being done in this case, it was erroneous to take a personal judgment against Mrs. Weil for any deficiency."

Gaynor v. Blewett, 86 Wis. 399, 57 N. W. 44, was a similar case, and this court held that there should be no judgment against the wife for a deficiency unless there was a showing that she signed the note on account of her separate property, and with intent to charge the same. See, also, *Franke v. Neisler,* 97 Wis. 364, 72 N. W. 887, to the same effect. The case of *Corn Exchange Ins. Co. v. Babcock,* 42 N. Y. 613, much relied on by plaintiff's counsel, does not sustain their position. In that case the defendant, a married woman, indorsed her husband's note as follows:

"For value received, I hereby charge my individual property with the payment of this note.

"ARMINA BABCOCK."

The complaint set out and the evidence showed that she had a separate estate, and intended to charge it. A judgment against her was sustained. In *Maxon v. Scott,* 55 N. Y. 247, the wife's contract was not as surety for her husband. It was one made with reference to her separate estate, which she possessed, and was held enforceable against her. In *Third Nat. Bank v. Blake,* 73 N. Y. 260, the wife indorsed her husband's note by a writing very similar to the one in the case at bar. Afterwards she signed a written contract, based upon a good consideration, reciting what she had done, consenting to an extension of time on the note, and waiving all defenses. This latter contract was held binding upon her, and the suit at law was maintained. In *Woolsey v. Brown,* 74 N. Y. 82, the wife gave an undertaking, and in it charged her separate property, describing it. In such case it was held that plaintiff need not resort to equity to enforce it. It is quite evident that these cases afford little or no justification for the ruling of the court below. In each case it appeared, either by the

complaint or evidence, that the wife was possessed of a separate estate, and made a valid and enforceable contract with reference to it. In the present case it is not shown that the wife possessed a separate estate.

Neither can any question of estoppel fairly arise against the wife. The plaintiff testified that he dealt entirely with the husband. He then spoke as follows:

"I borrowed Mr. Bruss some money, and he says: 'All right. I will make out a note to it.' A short time afterwards I didn't get it, and he borrowed of me $1,000 more. I said: 'It is time now. Make out the note, and give it to me in my hand now, and sign it from your wife, too.' I paid him the money before he gave me the note."

Plaintiff, having made his loan and paid over the money without any negotiation or communication with the wife, is in no position to invoke an estoppel against her.

By the Court.—Judgment is reversed, and the cause is remanded for a new trial.

CITIZENS LOAN & TRUST COMPANY, Administrator, Appellant, vs. WITTE and wife, imp., Respondents.

November 13—November 28, 1902.

Husband and wife: Deeds: Mortgages: Joint estates: Estates by entireties: Statutes: Married women: Separate estate: Assumption of mortgage as part of purchase price by married woman.

1. Under sec. 1, ch. 95, R. S. 1858, as amended by sec. 2340, R. S. 1878 (providing that the real estate of every description, including all held in joint tenancy with her husband, and the rents, issues and profits thereof, of any female now married shall be her sole and separate property as if she were unmarried), and sec. 3, ch. 95, R. S. 1858, as amended by sec. 2342, R. S. 1878 (providing that any married female may receive by inheritance, or by gift, grant, devise or bequest from any person other than her husband, and hold, to her sole and separate use,

and convey and devise real and personal property, and any interest or estate therein of any description, including all held in joint tenancy with her husband, and the rents, issues and profits in the same manner, and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor liable for his debts), covers cases of estates held as tenants by the entirety by husband and wife.

2. A deed conveying lands to husband and wife excepted from the covenants of warranty a mortgage which the grantees assumed and agreed to pay as part of the purchase price. *Held*, that the agreement of the husband and wife to assume and pay the mortgage was binding upon each of them, and that the wife, as well as the husband, was personally liable for any deficiency that might arise upon a sale of the premises on foreclosure.

3. A married woman may acquire land by purchase from a stranger entirely on credit and bind herself for the payment of the purchase price and, as part thereof, assume and agree to pay an existing mortgage thereon.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is an action to foreclose several notes, and a mortgage to secure the same, executed by the defendants John Schoerner and wife, May 8, 1890, to Paul Jenisch, for $2,000, with interest at six per cent., due November 8, 1895. It is found by the trial court, and is undisputed, that Jenisch transferred the notes and mortgage to one Daniel Goldstein, August 5, 1896, and that Goldstein died, and the plaintiff was appointed administrator of his estate before the commencement of this action, and as such brings this suit; that after the execution of the notes and mortgage Mrs. Maggie Dedi, having acquired title to the premises from and under the mortgagors, conveyed the same to the defendants *Otto Witte* and *Katharine Witte,* his wife, January 16, 1894, by deed of that date, reciting a consideration of $2,500, in which Maggie Dedi covenanted and agreed that at the time of the ensealing and delivery of such deed she was well seised of the premises described, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and that the

same were free and clear from all incumbrances whatever, except said mortgage of $2,000, which the said grantee, *Otto* and *Katharine Witte,* thereby "assumed . . . as part of the purchase money," which they thereby agreed to pay, together with the taxes of 1893. In addition to the facts stated, the court also found that there was due to the plaintiff upon the notes and mortgage $2,740.34, together with other facts usual in such judgment of foreclosure and sale.

"As conclusions of law, the court found that the plaintiff was entitled to judgment foreclosing the mortgage for the amount found due, but . . . that the plaintiff was not entitled to a personal judgment against the defendants *Otto Witte* and *Katharine Witte,* or either of them, for such deficiency, or any part thereof, that might arise on a sale of the premises."

Judgment was thereupon entered in accordance with such findings of fact and conclusions of law. From that part of the judgment adjudging that the defendants *Otto* and *Katharine Witte* were not personally liable, either jointly or severally, for the whole or any portion of the amount of any deficiency arising upon the sale of the mortgaged premises pursuant to said judgment, the plaintiff brings this appeal.

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *C. F. Hunter.*

For the respondents there was a brief by *Fiebing & Killilea,* and oral argument by *O. J. Fiebing.*

Cassoday, C. J. The defendants *Otto* and *Katharine Witte* purchased the mortgaged premises, and in the deed to them covenanted and agreed to assume and pay the mortgage as a part of the purchase price. They now claim, and the trial court apparently held, that their agreement was a nullity by reason of the fact that they were husband and wife and sued as such, and that the husband must be held jointly with his wife or not at all. They further contend that she was not liable because it was not alleged nor proved that at the time

of receiving the deed she had any separate estate or property of any kind, nor that she was in business for herself, or contemplated going into such business. In support of such proposition, counsel cite the statutes and rely upon several decisions of this court. *Gallagher v. Mjelde,* 98 Wis. 509, 74 N. W. 340, and cases there cited. Attention is also called to our statutes, which declare, in effect, that "the nature and properties" of "estates in severalty, in joint tenancy, and in common" continued to be the same as was established by law, except so far as modified by statutes; and that "all grants and devises of lands made to two or more persons" should "be construed to create estates in common, and not in joint tenancy, unless expressly declared to be in joint tenancy," but that such provision of the statute should "not apply to mortgages, nor to devises, or grants made in trust, or made to executors, *or to husband and wife.*" Secs. 2067–2069, Stats. 1898. Under these statutes, it is claimed that the estate created by the deed in question is the same as it would have been at common law; that is to say, the husband and wife did not take the title properly as joint tenants, nor tenants in common, but both were seised of the entirety, and the survivor will be entitled to the whole estate. 2 Blackstone, Comm. 182; 4 Kent, Comm. 362. Such rule of the common law has repeatedly been recognized by this court. *Ketchum v. Walsworth,* 5 Wis. 95, 103, 104; *Bennett v. Child,* 19 Wis. 362, 366; *Brown v. Baraboo,* 90 Wis. 151, 155, 62 N. W. 921; *Farr v. Trustees,* 83 Wis. 446, 453, 454, 53 N. W. 738; *Feidler v. Howard,* 99 Wis. 388, 393, 394, 75 N. W. 163. The important question presented is whether the rule has been modified by the statute enlarging the rights of married women and, if so, when? Prior to the Revised Statutes of 1878, those statutes related only to the sole and separate property of a married woman. And so in accordance with the common-law rule, which considered the husband and wife as one person in law, it was held that the husband had the en-

tire control during his life of lands so conveyed to him and his wife, and might convey and mortgage them for that period, but that he could not alienate them so as to give title after his death, if the wife survived him. *Bennett v. Child, supra; Bertles v. Nunan,* 92 N. Y. 152, 44 Am. Rep. 361. To obviate the effect of that decision, secs. 1, 3, ch. 95, R. S. 1858, were amended by secs. 2340 and 2342, R. S. 1878, as appears by the revisors' notes to those sections. To effect that object, sec. 1, ch. 95, R. S. 1858, was amended by inserting immediately after the word "estate" the following words, "of every description, including all held in joint tenancy with her husband," so that the same reads, with those words inserted in italics, as follows:

"The real estate *of every description, including all held in joint tenancy with her husband,* and the rents, issues and profits thereof, of any female now married, shall not be subject to the disposal of her husband, but shall be her sole and separate property as if she were unmarried." Sec. 2340, R. S. 1878.

And to further effect that object, sec. 3, ch. 95, R. S. 1858, was amended by inserting immediately after the words "estate therein" the following words, "of any description, including all held in joint tenancy with her husband," so that the same reads, with those words inserted in italics, as follows:

"Any married female may receive by inheritance, or by gift, grant, devise or bequest from any person other than her husband, and hold, to her sole and separate use, and convey and devise real and personal property, and any interest or estate therein *of any description, including all held in joint tenancy with her husband,* and the rents, issues and profits in the same manner, and with like effect as if she were unmarried, and the same shall not be subject to the disposal of her husband, nor be liable for his debts." Sec. 2342, R. S. 1878.

Thus, it appears that both sections as so amended, as well as the revisors in their notes, treat the estate created by deed

running to husband and wife, as in the case at bar, as an estate "held in joint tenancy," instead of being held as tenants of the entirety, as at common law. Technically, the language is incorrect. And yet the common-law rule, as mentioned in the authorities cited, is that the husband and wife, as such grantees, are not "*properly* joint tenants,"—not "*strictly* joint tenants." Undoubtedly, at common law the same words of conveyance which would make two other persons joint tenants would make the husband and wife tenants of the entirety. 2 Kent, Comm. (14th ed.) 132; *Ketchum v. Walsworth,* 5 Wis. 103. As stated by Blackstone:

"The properties of a joint estate are derived from its unity, which is fourfold,—the unity of *interest,* the unity of *title,* the unity of *time,* and the unity of *possession;* or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession." 2 Blackstone, Comm. 180.

At common law, a deed to husband and wife answered all of these requirements, except the fact that they being considered one person in law, and the husband being that person, enlarged his rights during coverture correspondingly, but the dominant characteristic of survivorship was the same. In view of what has been said, it may be that the learned revisors were justified in broadly using the words "held in joint tenancy," as they did in the sections of the statute quoted. Manifestly, the revisors intended by the amendments to cover cases of tenants of the entirety held by husband and wife, especially as in one section the words "held in joint tenancy" follow the words, "the real estate of every description," and in the other section follow the words, "any interest or estate therein of any description," and in both sections they are followed by the words, "and the rents, issues and profits thereof," or their equivalent. Unless that is so, the new provision inserted in the sections is without significance. We

must hold that the agreement of *Otto* and *Katharine Witte* to assume and pay the mortgage is binding upon them, and that they are liable for any deficiency that may arise upon the foreclosure sale of the premises. This is in harmony with the rule that a married woman without any separate estate may acquire land by purchase from a stranger entirely on credit, and bind herself for the payment of the purchase price. *Dayton v. Walsh,* 47 Wis. 113, 2 N. W. 65; *Gallagher v. Mjelde,* 98 Wis. 513, 74 N. W. 340, and cases there cited.

By the Court.—That part of the judgment of the superior court of Milwaukee county appealed from is reversed, and the cause is remanded with direction to complete the entry of judgment in accordance with this opinion, and for further proceedings according to law.

GIESE, Administratrix, Appellant, vs. MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Respondent.

November 13—November 28, 1902.

Appeal and error: Supreme court: Practice: New trial: Discretionary orders: Presumptions: Special verdict: Street railways: Personal injuries: Negligence: Contributory negligence.

1. Where it appears from the form of the order granting a new trial that alleged errors were not passed upon by the trial court, the supreme court will not pass upon them on appeal.
2. Where the court has granted a new trial on terms, and nothing appears in the record to the contrary, the fact that no ground is stated by the trial court for its ruling raises a presumption that it was granted in the exercise of the court's discretion because dissatisfied with the verdict.
3. In an action against a street railway for negligently killing plaintiff's intestate the evidence was such as would justify a finding of contributory negligence, and on that subject the special verdict contained inconsistent answers. *Held,* that there was no abuse of discretion in granting a new trial because of the unsatisfactory character of the verdict.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action to recover damages for the alleged negligent killing of Ferdinand Giese on the 11th day of October, 1900, and is brought for the benefit of the appellant, his widow, and administratrix of his estate. The evidence showed that Giese at the time of the accident was forty-six years of age, a man of good health, whose business was that of teamster for a coal company; that the defendant operated a double-track electric street railway upon East Water street, in the city of Milwaukee; that said street ran in a general north and south direction, and was crossed by Huron street at right angles; that deceased on the afternoon of October 9, 1900, was driving a team of horses attached to a coal wagon containing a load, of about four and one half tons, eastward on Huron street, and approaching East Water street; that, at the junction of the two streets, Huron street descends towards the center of East Water street at the rate of four feet per hundred; that high business buildings occupied the corners of the intersection of the two streets; that, as Giese came out into East Water street with his team, an electric car belonging to defendant approached very rapidly from the south on the easterly track; that Giese apparently attempted to stop his team, and then to turn towards the north, but that he seemed unable to escape collision, and the car struck the south front wheel of the wagon, knocking the horses down, and pushing both horses and wagon nearly or quite thirty feet north, and inflicting injuries on Giese from which he died within forty-eight hours. A special verdict was returned by the jury as follows:

"1. Did plaintiff's intestate, Ferdinand Giese, on the afternoon of October 9, 1900, at the intersection of Huron and East Water streets, in the city of Milwaukee, Milwaukee county, Wisconsin, receive injuries in a collision between a coal wagon, drawn by a team of horses, which deceased was driving, and an electric street car belonging to and operated

by defendant, then and there running in a northerly direction upon said East Water street, from which injuries said Giese died October 11, 1900? *Answer by court.* Yes. 2. At the time and while approaching the place of accident, was defendant's car moving at an unreasonably dangerous rate of speed? *A.* Yes. 3. If you answer the preceding question 'Yes,' was such unreasonably dangerous rate of speed the proximate cause of the injury received by the deceased, which resulted in his death? *A.* Yes. 4. Could the deceased, in the exercise of ordinary care, situated as he was at the time he drove into East Water street, have seen the approaching car in time, with the exercise of ordinary care, to have avoided the accident? *A.* No. 5. Would a person of ordinary care, situated as Ferdinand Giese was, have foreseen, as a natural and probable result of driving into East Water street, at the time and place and in the manner in which said Giese drove, that a collision between the wagon and the car would result? *A.* No. 6. Was Ferdinand Giese guilty of a want of ordinary care which proximately contributed to the accident? *A.* Yes. 7. If the court should be of the opinion that plaintiff is entitled to recover, at what sum do you assess her damages? *A.* $2,800."

The plaintiff moved for judgment on the verdict as it was rendered, or, if that motion be denied, that the verdict be amended by substituting "No" for "Yes" in answer to the sixth question, and for judgment upon the verdict as so amended. The defendant also moved for judgment on the verdict, or, if that motion be denied, then for an order changing the answer to the fourth question from "No" to "Yes," and for judgment on the verdict as amended, or, if both of said motions be denied, then for an order setting aside the verdict and for a new trial on eight grounds, viz.: Because the court erred (1) in refusing to nonsuit the plaintiff; (2) in refusing to direct a verdict for defendant; (3) in admitting evidence; (4) in excluding evidence; (5) in its charge; (6) in refusing instructions requested by defendant; and (7) in refusing to submit questions requested by defendant; and (8) because the answers to the fourth and sixth

questions of the verdict are inconsistent. The motions were argued together, and were all overruled, except the motion for a new trial, which was granted, without any cause being assigned, upon payment by defendant of the costs of the first trial. From this order the plaintiff appeals.

Joseph B. Doe, for the appellant.

For the respondent there was a brief by *Spooner & Rosecrantz,* and oral argument by *C. P. Spooner.*

WINSLOW, J. It is argued by appellant's counsel that there was no evidence to support the finding of contributory negligence, and that it was the duty of the court to change the answer of the sixth question from "Yes" to "No," and enter judgment for plaintiff. On the other hand, the respondent attempts to justify the order for a new trial on the ground that numerous errors were committed by the court in its rulings during the trial. It appears, however, by the form of the order granting a new trial, that these supposed errors were not passed upon by the court below in granting a new trial, and hence they will not be passed upon by this court upon appeal.

It is well settled that a court cannot be compelled to state the ground of its ruling in ordering a new trial, and that the fact that no ground is stated raises a presumption (nothing appearing in the record to the contrary) that the new trial is granted in the exercise of the court's discretion, because it disapproves of the verdict, either as against the weight of evidence, or perhaps as fatally inconsistent with itself, if it be special. It is also well settled that in such case terms should be imposed, whereas, if the new trial be granted because the verdict be perverse or entirely unsupported by the evidence, or because of errors of the court, costs should not be imposed. *Schraer v. Stefan,* 80 Wis. 653, 50 N. W. 778; *Garny v. Katz,* 86 Wis. 321, 56 N. W. 912; *Mills v. Conley,* 110 Wis. 525, 86 N. W. 203. So in the present case the form of the

order raises the presumption that the new trial was granted in the discretion of the court because it was dissatisfied with the verdict. This presumption is not overcome by anything appearing in the record, and, on the other hand, it is strengthened by the fact that costs were imposed upon the defendant as a condition of the new trial, which would have been error if the order were founded on errors of the court. Hence it must be treated simply as an order made in the exercise of the discretion of the court, because the court was dissatisfied with the verdict, which can only be reversed in case abuse of discretion is shown. Looking at the evidence presented in the bill of exceptions and at the verdict, we certainly cannot say that any abuse of discretion appears. On its face, the verdict is absolutely inconsistent, in that the answers to the fourth and fifth questions negative contributory negligence on the part of the deceased, while the answer to the sixth question directly finds him guilty of contributory negligence. Nor can we say, as argued by the appellant, that there is no evidence upon which an affirmative answer to the sixth question can be based. We do not say that the evidence proved him guilty of contributory negligence as matter of law, but simply that there was evidence for the jury on both sides of the question. For instance, one witness for the defendant, named Leisenfeldt, who was a passenger on the car, testified that he saw the team as it approached the crossing on the west side of East Water street; that the driver was facing northeast, and making no effort to stop his wagon; that he watched the team continuously; that he did not see the driver turn his face toward the car till his horses got on the west rails of the street car track; and that he made no effort to stop his horses before that time. There is other evidence of similar nature, though not so positive. It is true, there is evidence tending to show that the deceased looked to the south, and attempted to stop his team earlier than the witness Leisenfeldt testifies, and that the horses seemed to be unable to hold back the loaded wagon on

account of the grade; but, taken all together, the evidence is not such that it could be said that it was all one way, or that there was no evidence to justify the answer to the sixth question, or that the trial court abused its discretion in granting a new trial because of the unsatisfactory character of the verdict.

By the Court.—Order affirmed.

THE STATE EX REL. HOLZ, Appellant, vs. WOLSKI and another, Respondents.

November 13—November 28, 1902.

Mandamus: ***Practice: Appeal and error: Record: Surplus documents: Presumptions.***

1. After a relation has been filed and an alternative writ of *mandamus* issued, all matters going to the merits, whether by way of denial of facts asserted in the relation, or of other defensive matters, should be tried on due and proper pleadings, consisting of a return and an answer or demurrer thereto, and not on affidavits.
2. On appeal from *mandamus* proceedings, the record, unaccompanied by any bill of exceptions, and consisting merely of the relation, alternative writ, order denying the application on the merits, and judgment thereon, was transmitted to the supreme court; neither the order denying the application which recited the filing of affidavits in opposition to the application, nor the certificate of the clerk to the record on appeal, declared that such return contained all the papers filed, or that certain affidavits attached to the record were the ones used on the motion for such order. The clerk certified that the papers annexed were the original papers constituting the judgment roll, notice of appeal, and undertaking. *Held*, it would be presumed that circumstances existed sufficient to warrant the trial court's making the order dismissing the application.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

The relator, having presented his verified petition for *mandamus* requiring the defendant *Wolski,* a justice of the peace, to make certain corrections in his docket, and the alternative writ having issued, bearing *teste* May 1, 1901, the circuit court on November 12, 1901, entered an order reciting that the application of the plaintiff for a writ having come on to be heard, and the respondents having filed affidavits in opposition to said application, and *having moved to dismiss said application,* it is ordered that the application of the relator for a writ of *mandamus* be denied, and that judgment be entered in favor of the respondents and against the relator, dismissing said application upon the merits, and for costs. To that order exception was taken, whereupon judgment was entered that "the application for a writ of *mandamus* be, and the same hereby is, denied"; also that respondents recover a specified sum for costs. From that judgment the appeal is taken. The record contains no bill of exceptions, but a large number of affidavits, in some measure denying the allegations of the relation, and also asserting that prior thereto there had been issued a writ of *certiorari,* in response to which the justice had sent his record to the circuit court. The order above referred to makes no specification of the affidavits upon which it was based, and the certificate of the clerk to the record on appeal does not declare that such return contains either all the papers filed, or that the affidavits so filed are the ones used upon the motion for said order of dismissal, nor all of them; merely that the papers annexed are the original papers which constitute the judgment roll, notice of appeal, and undertaking.

Irving T. Ford, for the appellant.

For the respondents the cause was submitted on the brief of *Doerfler, McElroy & Eschweiler.*

Dodge, J. The record before us seems to present an extremely anomalous proceeding, involving the utmost confu-

sion as to the proper practice in *mandamus*. The relation having been filed, and the alternative writ issued, all matters going to the merits, whether by way of denial of the facts asserted in the relation, or of other defensive matter, should have been tried upon due and proper pleadings, consisting of a return and an answer or demurrer thereto. Apparently the parties sought to try them by the filing of affidavits which might have been admissible in response to a motion for the issuance of the alternative writ. The more serious difficulty, however, is whether the record (for only the record is before us and can be considered) suffices to show error in entering the judgment appealed from. That record consists merely of the relation and alternative writ, the order for judgment dismissing such application, and judgment entered thereon. All other papers transmitted to us are mere surplusage, and of no authenticity or use. Error must be made to affirmatively appear, and all presumptions not negatived by the record must be indulged in favor of the correctness of the court's action. *Glover v. Wells & M. G. Co.* 93 Wis. 13, 66 N. W. 799; *In re Ogle's Estate,* 97 Wis. 56, 72 N. W. 389. It is, of course, possible that some facts might have been disclosed to the court upon affidavit to warrant the dismissal of the application and the alternative writ. Facts going to the jurisdiction of the court or the capacity of the relator might, perhaps, have been thus made to appear, and to warrant such action without putting the parties to the further steps of pleading. This being so, and there being neither bill of exceptions nor certificate of either court or clerk excluding the possibility of such showing, we must assume that the motion to dismiss, recited in the order mentioned in the statement of facts, was made upon and was supported by something not brought before us. In other words, since circumstances might exist to warrant the court in making that order, and since there is no authoritative showing that they did not so exist, we must presume that they did, and that the court properly

ordered a dismissal of the application. If that order was rightly made, the judgment properly follows, and is supported thereby; hence no error affirmatively appears.

By the Court.—Judgment affirmed.

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116 74 | 116 141 | THE MILWAUKEE NATIONAL BANK OF WISCONSIN, Appellant, vs. GALLUN and wife, Respondents.

November 28—December 16, 1902.

Appeal and error: Findings: Indefiniteness: Construction: Presumptions.

1. A finding of the trial court, "that plaintiff wholly failed to substantiate his allegations by a preponderance of evidence," standing alone, fails to declare the issuable facts upon which such conclusion is announced, and does not comply with sec. 2863, Stats. 1898, requiring the trial judge in his decision to state the facts found by him.
2. Where in a preamble to his findings the trial judge described plaintiff's claim as to two issues of fact, and then finds "that plaintiff wholly failed to substantiate his allegations by a preponderance of evidence," such finding will be presumed to apply to those issues and to negative them.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

On September 20, 1898, and for some years theretofore, the respondent *Frederick Gallun* was a hardware merchant in Milwaukee, and a regular depositing and borrowing customer of the appellant, although his borrowing had not exceeded $600 at any one time. On that day he applied for a loan of $800, which was accorded him, his note at four months taken therefor, and the amount carried to the credit of his general account, which already contained between $2,400 and $2,500. On the same day defendant drew and

had certified a check of $3,180, which nearly, but not quite, exhausted his deposit account, and paid the same to the Northwestern Mutual Life Insurance Company in satisfaction of a $3,000 mortgage theretofore existing upon his homestead in the city of Milwaukee. The plaintiff claims that the loan of $800 was made expressly for the purpose of being used to take up this mortgage, and upon a promise that at any time when requested respondent would secure the same by a mortgage on the same premises. Both of these assertions are denied by the defendant as a witness, and by his son, who claims to have been present at the transaction. Thereafter the $800 was renewed from time to time, and on three occasions further amounts were borrowed, which in each case were added to the preceding indebtedness, and a new note given for the whole, until it reached the sum of $1,500 on March 17, 1900, when a note for that amount was given, and was renewed on June 15, 1900. At the maturity of that note—October 15th—respondent asked ten days' additional delay, and about the 20th of October, 1900, filed his petition in bankruptcy, and on October 25th was adjudged bankrupt, and on December 20, 1900, discharged from his debts. Thereafter appellant, not having proved its debt in bankruptcy, commenced this action, alleging the loan of the original $800 to be used towards paying off this mortgage, and of other sums towards paying taxes on the land, and an agreement by respondent to secure same by mortgage; and praying that the release of the insurance company's mortgage be set aside and vacated, and the same be declared a valid and subsisting lien in plaintiff's favor for the said sum of $1,500 and interest, and for subrogation of the plaintiff for said sum of $800 and the additional loans, and that the mortgage be foreclosed for said sums; also praying that the defendants, *Frederick Gallun* and his wife, be compelled to execute a mortgage on said premises to secure said indebtedness of $1,500. After trial the court made findings of fact to the

effect "that the plaintiff wholly failed to substantiate his allegations by a preponderance of evidence," and thereupon entered judgment in favor of defendants, from which the plaintiff brings this appeal.

For the appellant there was a brief by *Miller, Noyes & Miller,* and oral argument by *A. W. Fairchild.*

M. N. Lando, for the respondents.

DODGE, J. Our only serious doubt in this case has been as to the effect to be given the so-called finding of facts to the effect merely "that plaintiff wholly failed to substantiate his allegations by a preponderance of evidence." This is in no fair sense a performance by the trial judge of his duty enjoined by sec. 2863, Stats. 1898, that he shall, in his decision, state the facts found by him. The fault is not, as urged by appellant, that the finding in question only states an opinion or conclusion, for that is the true function of the trial court, namely, to state, not the evidentiary facts, but his conclusion therefrom upon the ultimate issuable facts tried before him. This finding, however, standing alone, fails to declare the issuable facts upon which such conclusion is announced. It cannot be taken generally, for some of plaintiff's allegations were established beyond controversy,—such as that the moneys in question were loaned, and that such moneys, or part of them, were used by defendant to pay off his mortgage to the insurance company. If, then, the finding is not to be taken as true according to its words, how far does it indicate action of the judicial mind? Such question ought never to confront either a defeated litigant or the appellate court. Being presented, however, we must try to answer it, so far as we can do so with reasonable certainty, to the end that the judgment be not reversed unless error affirmatively appear. It must, of course, be assumed that the trial judge intended to declare his conclusion upon some, at least, of the material issues of fact; and we find that in a sort of preamble he de-

scribes plaintiff's claim as to two of such issues, namely, that the $800 was borrowed for use in paying off the insurance company's mortgage, and that defendant promised to execute a mortgage to plaintiff when demanded. With some hesitation we conclude that the finding quoted must be assumed to apply to these contentions of plaintiff, and to negative them. See *Duncan v. Duncan,* 111 Wis. 75, 76, 86 N. W. 562. That conclusion having been reached, and the finding being excepted to, we have made examination of the evidence, which discloses a conflict as to the transaction of borrowing these moneys; as to whether they, or any of them, were loaned for the purpose of discharging the existing mortgage; and whether there was any agreement to secure them by mortgage. Whether we might think the fair preponderance of this evidence supports or refutes plaintiff's claims, we cannot say that a negative finding is against any such clear and overwhelming preponderance as to justify its reversal under established rules. *Hill v. American Surety Co.* 112 Wis. 627, 631, 88 N. W. 642. Of course, in the absence of these facts, there can be no right either to subrogation or to judgment requiring defendants to execute a new mortgage, and any discussion or decision upon the law applicable under other circumstances is unnecessary.

By the Court.—Judgment affirmed.

BJORKQUIST, Appellant, vs. SCHOMBERG, imp., Respondent.

November 28—December 16, 1902.

Appeal and error: Questions reviewed.

Where the question at issue is solely one of fact, the findings of the trial court thereon will not be reversed unless clearly against the preponderance of the evidence.

APPEAL from a judgment of the superior court of Milwaukee county: OREEN T. WILLIAMS, Judge. *Affirmed.*

For the appellant there was a brief by *Turner, Pease & Turner,* and oral argument by *W. J. Turner.*

J. E. Wildish, for the respondent.

WINSLOW, J. This is an action in equity, brought by the plaintiff, a judgment creditor of the Union Land Company, an insolvent corporation, against the respondent *Schomberg* and a number of other persons, claiming that they were liable upon subscriptions to the capital stock of said corporation, or as successors to subscribers of said capital stock. Judgment was obtained against some of the defendants, but as to the respondent *Schomberg* the complaint was dismissed, and the plaintiff appeals from that part of the judgment. The plaintiff's claim was that *Schomberg,* some time after the organization of the corporation, purchased 270 shares of its stock, having a par value of $10 each, upon which there was due and unpaid at least the sum of $740, which sum has never been paid. On the other hand, the defendant claimed that he at no time purchased or owned more than 122 shares of the stock, which stock was fully paid and nonassessable when he purchased, and that thereafter, and prior to the commencement of this action, he surrendered his stock to the corporation, and also paid $1,000 to the corporation, and received in consideration therefor three building lots owned by the corporation. The question at issue was purely one of fact. There was testimony on both sides of the proposition. It cannot be said that the finding of the trial court was so clearly against the preponderance of the evidence that this court would be justified in reversing it. No useful purpose would be subserved by rehearsing the evidence.

By the Court.—Judgment affirmed.

BARDEEN, J., took no part.

JULIEN, Appellant, vs. MODEL BUILDING, LOAN & INVESTMENT ASSOCIATION, imp., Respondent.

MODEL BUILDING, LOAN & INVESTMENT ASSOCIATION, Respondent, vs. JULIEN, imp., Appellant.

November 29—December 16, 1902.

Building and loan associations: Mortgages: Election to declare whole debt due: Service of notice: Constitutional law: Equal protection of the laws: Special legislation: Title of act: Statutes: Implied repeal: Public policy.

1. The rule in Wisconsin, that a mortgagee, who, by reason of some default and under an option permitting such action in advance of maturity of the debt, seeks to foreclose his mortgage, must exercise his election and give notice thereof to the mortgagor before bringing suit, is a rule of equity, and, in the absence of some express or implied contract for such notice, a mortgagor, who has left his usual place of abode without making any provision for the forwarding of his mail, and without giving the mortgagee notice of change of address, is *held* to have waived giving any better notice than by mail, addressed to his usual place of abode last known to the mortgagee.
2. Sec. 2014—5, Stats. 1898, giving to mortgages of building and loan associations priority over liens upon the mortgaged premises, *filed* subsequent to the recording of the mortgage, is not repugnant to sec. 1, art. XIV, U. S. Const., prohibiting any state from making or enforcing any law which shall deny to any person within its jurisdiction the equal protection of the laws.
3. Sec. 2014—5, Stats. 1898 (ch. 368, Laws of 1897, entitled "An act regulating building and loan associations"), is not a private or local law, within sec. 18, art. IV, Const., prohibiting the legislature from enacting any private or local law containing more than one subject, which must be stated in the title.
4. Ch. 368, Laws of 1897 (sec. 2014—5, Stats. 1898), entitled "An act *regulating* building and loan associations," reasonably suggests the means deemed necessary or appropriate to the efficient administration of their business and the status of their mortgage liens, as regards other liens on the property affected, within the prohibitions of said sec. 18, art. IV, Const.
5. Under sec. 18, art. IV, Const., providing that the subject of any private and local law must be stated in its title, the statement of the subject is purely a legislative function, and in that respect the legislature is unrestricted so long as language is used

which, in any reasonable view, can be said to state such subject matter.

6. Sec. 3314, Stats. 1898, making mechanics' liens date from the commencement of the work, was part of the revision of 1878, and re-enacted as ch. 380, Laws of 1897, which last act is of later date than ch. 368, Laws of 1897 (sec. 2014—5, Stats. 1898), giving mortgages of building and loan associations priority over other liens on the mortgaged premises filed subsequent to the recording of the mortgage. Sec. 4985, Stats. 1898, declares that the provisions of the revision of 1898, so far as they are the same in substance as those of existing laws, shall be construed as a continuation of such laws and not as new enactments. *Held*, that since ch. 380, Laws of 1897 (sec. 3314), contained no repealing clause, and was only enacted to give immediate effect to certain sections of the revision of 1898, it cannot be said to repeal ch. 368, Laws of 1897 (sec. 2014—5, Stats. 1898), although repugnant thereto and enacted later.

7. A constitutional legislative enactment cannot be rightly spoken of as contrary to public policy.

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

Action to enforce a lien on real estate under sec. 3314, Stats. 1898, as to the owner of two mortgages on the property, and other persons; and an action by the mortgagee against the lien claimant and such others to foreclose the mortgages. The actions were tried together on the issue raised by the answer of the mortgagee to the complaint in the lien action, and the answer of the lien claimant in the suit to foreclose the mortgages, as to whether such mortgages were encumbrances upon the property, affected by both claims, superior to the lien.

The following points were decided by the trial court, omitting formal matters as to which there is no dispute: May 25, 1899, defendants Mary Siebert and Frank Siebert, her husband, for value gave the *Model Building, Loan & Investment Association,* a corporation organized under the laws of this state and of the character its name indicates, their bond to secure the payment of $3,000 with interest, and as collateral security thereto gave the association a mortgage in the ordi-

nary form, dated on such day, on the premises described in the complaint, which said mortgage, on the day of the date thereof, was duly recorded. It was provided in the bond, among other things, that in case of any default in the conditions thereof existing for the space of six months, or the obligor suffering a mechanic's lien to accrue or be filed against the mortgaged property, the entire indebtedness should, at the option of such association, become due. The provisions of the bond, in addition to the one particularly mentioned, are in harmony with the usual methods of dealing between a building and loan association and its borrowing members. The amount due upon the bond and mortgage is $3,542.38, with interest from the date of the findings, which sum the association is entitled to recover. On January 2, 1901, the conditions precedent to the right of the association to declare due the entire amount secured by the bond and mortgage existed, and it exercised its option in that regard by mailing copies of a notice of election in the matter to each of the debtors at their respective postoffice addresses in the city of Milwaukee, with the postage prepaid thereon. Facts similar to those mentioned exist as to the second bond and mortgage declared on in the foreclosure complaint and in the answer of the association in the lien action, for $1,000. Such mortgage was given by the Sieberts to the association December 16, 1899, and was duly recorded December 19, 1899. The amount the association is entitled to recover on such bond and mortgage is $365.21, with interest thereon from the date of the findings. Facts exist, alleged in the complaint in the lien action, entitling the plaintiff therein to a lien under sec. 3314, Stats. 1898, for $199.67. The lien petition was filed July 19, 1900. The lien dates from September 15, 1899, subject to whatever right of priority the association has under sec. 2014—5, Stats. 1898, which provides that mortgages upon real estate, taken by such associations, shall take precedence over all liens

upon the mortgaged premises filed subsequent to the recording of such mortgages. The court decided as a matter of law that by force of such statute the plaintiff's lien was subordinate to the two mortgages, and ordered judgment of foreclosure of the mortgages, with suitable provisions for the protection of the lien claimant and other defendants interested in the property. The lien claimant appealed.

M. N. Lando, for the appellant.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. H. Remington.*

MARSHALL, J. The necessity of notice of election, by a creditor to his debtor, to exercise an agreed option to treat an entire indebtedness as due before the date specifically named in the papers evidencing the same and securing its payment, for nonperformance of some stipulation of the contract, as a condition precedent to the use of judicial remedies for collection of the whole debt, is merely a rule of equity. In most jurisdictions no such notice is necessary. It is held that if the debtor makes default he is neither legally nor equitably entitled to notice that by reason thereof the creditor will consider the debt all due, before judicial remedies are resorted to to collect the same, unless such a notice is specifically provided for in the contract; that it is not the business of the courts to supply an element in the contract, by an arbitrary rule of construction, which the parties see fit to omit, because, without it, the contract would seem to be a harsh one. This court stands alone, or nearly so, in holding that notice of election should be given the debtor as a condition of treating the contract as fully matured; but its decision in that regard is not based upon a construction of the contract. 2 Pingrey, Mortg. § 1539; Jones, Mortg. § 1182*a,* and cases cited. Pingrey is in error in classing California with this state on the subject. He cites *Monroe v. Fohl,* 72 Cal. 568, 14 Pac.

514, where the subject of necessity of notice before suit brought was not considered, the sole question being, What are the essentials of notice where one is required? In subsequent cases that court distinctly held that no notice is necessary unless specially required by the terms of the contract. *Hewitt v. Dean,* 91 Cal. 5, 27 Pac. 423; *Sichler v. Look,* 93 Cal. 600, 29 Pac. 220. In *Hewitt v. Dean* this language was used:

"It was competent for them to include in their note or mortgage a provision requiring notice of such election as a condition precedent to instituting the suit; but instead thereof they have agreed that upon the mere fact of the default the plaintiff may, at his option, treat the whole amount as due, and foreclose the mortgage. To add to this agreement the requirement that the plaintiff shall give notice of the election would be for the court to add to the agreement of the parties a condition which they have not themselves chosen to make."

The rule here was first distinctly stated in *Basse v. Gallegger,* 7 Wis. 442. It was not based upon judicial or other authority. The decision is not in conflict with those we have cited and many other cases that might be mentioned, as regards reading a requirement for notice out of the contract by construction. The rule was declared, as before indicated, as a rule of equity, to be applied where a person seeks its jurisdiction to enforce his mortgage to the full extent, under an option so to do, by reason of some default in the terms thereof. This language was used:

"It seems to us but just and proper to require the mortgagee, in cases like the present, to exercise his election, and give notice thereof to the mortgagor, before bringing suit."

There is no disposition to recede from a doctrine so long established, or even to criticise it. The state of the law in general has been referred to merely to show that decisions as to what is sufficient notice of election to exercise the option, in a case where notice thereof is required by the contract either expressly or by implication, are not controlling where

the requirement for such notice is not a matter of contract but a mere condition of the use of the equity jurisdiction to enforce the security. No doubt the rule that he who asks equity must do equity led to the adoption of the judicial policy of this state. If a person who, under ordinary conditions, is entitled to the benefit of the rule, is guilty of conduct toward his creditor rendering compliance by the latter unnecessarily burdensome, as by secreting himself, so notice of the election to treat the whole debt due cannot be served upon him, or by leaving his usual place of abode without acquainting his creditor where he can be reached by mail or otherwise, or making any provision for obtaining mail addressed to him at his last known place of residence,—he cannot be heard to complain that injustice was done him by his creditor's noncompliance with the rule. He will be deemed to have waived such compliance, or forfeited it. The equitable considerations which led the court to adopt the policy appellant invokes, justify, if they do not demand, the countervailing rule we have suggested, protecting the creditor against danger of having the value of his contract unnecessarily diminished by negligence or wilful misconduct on the part of the debtor, rendering it unreasonably difficult for the former to comply with the judicial rule designed for the latter's protection.

The claim here made is that proper notice of election to treat the entire indebtedness due was not given to the debtors, wholly on the theory that, prior to the time notices were mailed to them at Milwaukee, Wisconsin, their post-office address when the indebtedness was contracted and for a considerable period of time thereafter,—they had changed their place of abode to some unknown point outside the state. Assuming in appellant's favor, for the purpose of the point under discussion, that the evidence shows all that is claimed for it, we think the debtors, by their conduct, waived the giving of any better notice to them than the one given. If

they made no arrangement, upon departing from the state, to have mail addressed to them at Milwaukee, Wisconsin, forwarded to them, and gave their creditor no information as to where they could be reached in some better way than by letter addressed to them at their old post-office address, they have no standing in equity to complain that they were brought into court to defend against a claim that the whole indebtedness was due, in advance of being notified of the exercise by their creditor of its option in the matter; and, obviously, persons claiming under them, circumstanced as appellant is, can have no better right than they.

Sec. 1, art. XIV, of the United States constitution, providing that, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws," does not preclude state legislation applicable only to a particular class of persons, if there is a reasonable ground for treating such class of persons different from the general mass. That constitutional provision was so construed by the supreme court of the United States early after its adoption, and the construction steadfastly adhered to up to the present time. *Soon Hing v. Crowley,* 113 U. S. 703, 5 Sup. Ct. 730; *Barbier v. Connolly,* 113 U. S. 27, 5 Sup. Ct. 357; *Missouri P. R. Co. v. Humes,* 115 U. S. 512, 6 Sup. Ct. 110; *Missouri P. R. Co. v. Mackey,* 127 U. S. 205, 8 Sup. Ct. 1161; *Bell's Gap R. Co. v. Pennsylvania,* 134 U. S. 232, 10 Sup. Ct. 533. In *Barbier v. Connolly,* the court, speaking by Mr. Justice FIELD, said:

"Neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had."

In *Missouri P. R. Co. v. Mackey, supra,* referred to in respondent's brief, this language was used:

"The greater part of all legislation is special, either in the object sought to be attained by it or in the extent of its application. . . . When legislation applies to particular bodies or associations . . . it is not open to objection that it denies to them the equal protection of the laws if all persons brought under its influence are treated alike under the same conditions."

Legislative discretion to classify persons for the purposes of legislation is substantially the same under the fourteenth amendment of the federal constitution as under the state constitutional provision prohibiting special legislation. The rules on the subject, which generally prevail, and which have received the sanction of this court, are as follows: (1) All classification must be based upon substantial distinctions which make one class really different from another. (2) The classification adopted must be germane to the purposes of the law. (3) The classification must not be based upon existing conditions only; it must not be so constituted as to prevent additions to the number included within the class. (4) To whatever class a law may apply, it must apply equally to each member thereof. *Johnson v. Milwaukee,* 88 Wis. 383, 60 N. W. 270. Whether any particular classification made by the legislature satisfies those requisites is primarily a legislative question. The field covered by its discretionary power in the matter is very broad. It is, of course, not above judicial control, but is safe from restraint so long as any reasonable ground can be discovered to support it. The court can apply no test to the matter except the constitutional test. That of the mere wisdom of the measure is exclusively for legislative consideration.

If we were called upon to apply the law as above stated, without the aid of judicial authorities, to sec. 2014—5, Stats. 1898, giving to mortgages of mutual building and loan associations priority over other liens upon the mortgaged premises

and the buildings and improvements thereon, filed subsequent to the recording of the mortgage, for the purpose of determining whether such legislation is constitutional, it would stand the test. The supposed dominant purpose of building and loan asociations is to promote, by means of the mutual efforts of a large number of persons, the ownership of homes in severalty for themselves and families. The acquirement and enjoyment, in an individual way, free from hostile demands of creditors, of the comforts of life, was deemed to be of sufficient importance to the state at the time of the adoption of the constitution, that a mandate was embodied in it requiring the legislature to promote safe proprietorship in that regard by wholesome laws. Certainly, laws reasonably calculated to promote the acquirement and safe enjoyment of homes are within the spirit of that constitutional provision. The legislative policy of the state, embodied in our statutes, shows that it has always been so regarded. Upon that ground alone, if upon no other, the law in question would be safe from condemnation as being unconstitutional class legislation. But, independently of such constitutional recognition of the importance of promoting individual security from loss of the comforts of life by hostile demands of creditors, the social instinct suggests home building and proprietorship in an individual way, as strongly as any one thing that can be mentioned in the economy of nature, which is not given to us from its bounty without effort on our part to secure it. Nothing contributes more to the prosperity of a people, individually and collectively, than the general satisfaction of the desire for home ownership, which all must admit is universal, as we have indicated. Hence, a law applicable to a class of corporations designed primarily to administer to that desire, cannot be reasonably said to be unconstitutional because the classification is not legitimate. The law in question seems to satisfy all the essentials of one applicable only to a particular class of persons, so as to remove it safely beyond the condem-

nation of the fourteenth amendment of the national constitution.

The conclusion reached by courts elsewhere is in harmony with the views above expressed. *McLaughlin v. Citizens B., L. & S. Asso.* 62 Ind. 264; *Shaffrey v. Workingmen's S., L. & B. Asso.* 64 Ind. 600; *Holmes v. Smythe,* 100 Ill. 413; *Freeman v. Ottawa B., H. & S. Asso.* 114 Ill. 182, 28 N. E. 611; *Winget v. Quincy B. & H. Asso.* 128 Ill. 67, 21 N. E. 12; *Security L. Asso. v. Lake,* 69 Ala. 456; *Vermont L. & T. Co. v. Whithed,* 2 N. Dak. 82, 49 N. W. 318. In most of the cases cited the question whether it was constitutional to make building and loan associations a class by themselves for legislative regulation of interest charges was the one considered; but certainly classification on that subject would not have better reason to support it than classification as regards priority of liens. In the case last cited this language was used:

"Operations of building and loan associations, when confined to their own members, differ so radically from ordinary loan transactions that the legislature was clearly warranted in placing such associations in a separate class for the purposes of such legislation as pertains to interest and usury."

Counsel for appellant calls attention to some authorities contrary to the views we have expressed, particularly *Gordon v. Winchester B. & A. F. Asso.* 12 Bush, 110. We have examined them all, and many other authorities, which we do not deem necessary to specially mention here. In our judgment the better reasoning and the greater weight of authority is in harmony with the conclusions we have reached.

The law under which respondent's mortgage lien was adjudged superior to appellant's lien under sec. 3314, Stats. 1898, is ch. 368, Laws of 1897. It is entitled "An act regulating building and loan associations." It is suggested that the term "regulating," with its context, does not suggest that feature of the body of the act relied on by respondent neces-

sary to its judgment, hence that, as regards such feature, at least, the law is fatally defective under sec. 18, art. IV, of the constitution, which prohibits the passage of any private or local law containing more than one subject, which must be stated in its title. There are two sufficient answers to that: (1) The law is plainly not a private or local law. It is a general law as distinguished from a local law as the latter term is used in the section under consideration. It has none of the characteristics of a private act. A law applicable to a special class of persons is a public and general law. *Milwaukee Co. v. Isenring,* 109 Wis. 9, 85 N. W. 131. (2) The title to the act suggests, reasonably, in our judgment, any means deemed by the legislature necessary or appropriate to the efficient administration of the business of building and loan associations. Obviously, the status of their mortgage liens, as regards other liens on property affected, falls within that field. The technical meaning of words used in the title to a law cannot be safely taken to mark the limits of the enactment. The broadest meaning of which the words are reasonably susceptible under the circumstances must be given to them, since the constitution leaves to the legislature unrestricted authority respecting the manner in which the subject of a law shall be stated in its title, so long as language is used which in any reasonable view can be said to state such subject. The statement of the subject is purely a legislative function. Courts cannot condemn the exercise thereof because, in their judgment, it might have been exercised better. The limit of judicial authority is to determine whether there was a failure to exercise the legislative function in the given case. *Diana Shooting Club v. Lamoreux,* 114 Wis. 44, 89 N. W. 880.

A suggestion is made by appellant's counsel that the provision of sec. 3314, making liens of the character of appellant's date from the time of the commencement of the building regardless of when the work for which the lien is claimed was done or the material furnished, was re-enacted in August,

1897, by ch. 380 of that year; that such chapter, being a later act than the one upon which respondent's judgment depends, repeals so much of such act as is repugnant thereto. The conclusive answer to that is that the feature of sec. 3314 upon which counsel for appellant relies did not originate with ch. 380, Laws of 1897. It is as old as the Revised Statutes of 1878. The only purpose of ch. 380, Laws of 1897, was to give immediate effect to certain sections of the new revision of the statutes which went into effect as a whole in September, 1898. It contains no repealing clause and was not intended to operate to repeal any existing law carried forward into the new revision, and by such revision to re-enact such law. In the general act giving effect to the new statute, passed at the same time as the special act under discussion, it was expressly provided that:

"The provisions of these revised statutes, so far as they are the same in substance as those of existing laws, shall be construed as a continuation of such laws and not as new enactments." Sec. 4985, Stats. 1898.

In that the legislature only voiced the unwritten law. *Laude v. C. & N. W. R. Co.* 33 Wis. 640; *Gilkey v. Cook,* 60 Wis. 133, 18 N. W. 639; *Cox v. North Wis. L. Co.* 82 Wis. 141, 51 N. W. 1130. But its action, in connection with the absence of any repealing clause in ch. 380, Laws of 1897, indicates clearly that the enactment of such chapter was not intended to give existing laws which were continued, the character of original legislation; but that the contrary is expressly negatived.

The further claim is made that the law in question is contrary to public policy. We know of no ground upon which a constitutional legislative enactment can be rightly spoken of as contrary to public policy. What is and what is not public policy must obviously be determined by the written and the unwritten law, giving precedence to the former where the two are in conflict. We sometimes say that a contract is void be-

cause contrary to public policy, in that it is contrary to the policy of the law. Laws are never said to be contrary to public policy in any other sense than contrary to constitutional policy. To illustrate, a promissory note made on Sunday is said to be void, not because expressly made so by any written law, but because it is a penal offense to transact business on the Sabbath day. *Howe v. Ballard,* 113 Wis. 375, 89 N. W. 136; sec. 4595, Stats. 1898. We look to the statute in testing the validity of the note. It does not in terms condemn it as void, but it prohibits the doing of business, which includes the making of a note; therefore the giving thereof on the Sabbath day is contrary to the policy of the law, in other words, contrary to public policy, hence judicial remedies cannot be invoked, successfully, to enforce it. Statutes are not tested by any rule of public policy. We look to the statutes as well as the unwritten law to determine what is and what is not public policy, and then we test acts *inter partes* by the result. If such acts are not directly the subject of legislation, we say they are contrary to public policy. When we leave constitutional limitations out of view, the will of the legislative branch of the government, when expressed, is the highest evidence of public policy. To judicially condemn its expressed will, when exercised within constitutional limitations, would be the plainest kind of usurpation. Baron PARKE, in *Egerton v. Brownlow,* 4 H. L. Cas. 122, 123, expressed the same idea substantially thus:

'It is the province of the statesman and not of the lawyer to discuss, and of the legislature to determine what is best for the public good, and to provide for it by proper enactments. It is the province of the judge to expound the law, to declare public policy as he finds it in the unwritten and written law. Public policy is a proper ground for a decision only in the sense of the policy of the law, not in the sense of mere judicial notions as to what is best for the public good. An act [speaking of an act *inter partes*] is properly said to be illegal when it is contrary to the principles of established law.'

What we have said covers all the assignments of error generally and in detail that are presented for consideration in the brief of appellant's counsel.

By the Court.—The judgment is affirmed.

KOEPCKE, Administrator, Appellant, vs. WISCONSIN BRIDGE & IRON COMPANY, Respondent.

November 29—December 16, 1902.

Master and servant: Negligence: Personal injury: Contributory negligence: Assumption of risk: Infants: Immaterial error.

1. An employee who was accustomed to cast off belts from pulleys, but who had never before removed the belt from the pulley at the point at which he was killed, attempted to do so while standing on two transverse pieces of timber, of respectively six and four inch surface, and at an elevation of nineteen feet from the floor, to which he had stepped from a twelve-inch plank, with a guard rail on its side, located on the side opposite the pulley. *Held*, that the employee assumed the risk, and was guilty of contributory negligence precluding recovery.
2. Assumption of risk is but a phase of contributory negligence, and it is immaterial whether the employee affected thereby be an adult or a minor.
3. It being shown that an employee assumed the risk incident to dangerous premises, there is nothing prejudicial in excluding evidence tending to show that in other parts of the premises, where similar work was required, a safer place was provided.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action to recover damages for the death of plaintiff's intestate on September 23, 1898, by negligence of the defendant, his employer, under the following circumstances: Albert Koepcke, then nineteen years old, had been employed for about a year in and about defendant's shops, where was manufactured structural iron and bridge work. For about two

months before the injury he had been employed as oiler, with the duty of oiling the bearings of the various shafts and machinery, and also with the duty of casting belts off from the pulleys on the main shaft, connecting with various machines which were not to run when the engine was kept in operation during the night. When so first employed, he had been shown how to do the work by his predecessor in that employment. There is no evidence that he was other than ordinarily intelligent; the only evidence being that, after the first week of such employment as an oiler, he had acquired familiarity with the work, and required no further instruction. On the night of the injury, at about ten minutes past six, for the first time in his service, it became necessary to cast off the belt connecting with a certain riveting machine from its pulley on the main shaft. That shaft extended through the shop at an elevation of approximately twenty feet from the ground, and under it, apparently furnishing its support, was a timber framework, consisting of a timber parallel to the shaft, six inches wide, crossed near the pulley in question by another timber four inches wide. The deceased, learning that this belt needed to be cast loose from the pulley by his predecessor as oiler, offered to go and do it, and was told by such predecessor to be careful, because it was a bad place to do any work. Deceased thereupon ascended a ladder to a sort of footway, consisting of a twelve-inch plank, apparently laid on the timber framework, and passed along the same parallel to the main shaft, and southward toward the pulley in question. That plank apparently had a hand rail, though this is not very clear in the evidence. Such plank terminated about eighteen inches from the pulley in question, and from that point the belt, which had to come off on the south side of the pulley, could have been pushed off, but the evidence shows that it was easier and customary to stand on the side of the pulley toward which a belt was to be thrown off; and the deceased, leaving the plank, stepped around the pulley to the

south side thereof, and, standing at the intersection of the two timbers above described, undertook, by means of a stick as a lever, to pry the belt off toward him. While so doing he lost his balance and fell to the ground below, receiving injuries which resulted fatally in a few hours. There was light enough, so that one could readily see the whole situation. At the close of plaintiff's evidence, which consisted of that of a single witness, the court granted a motion for nonsuit, and later entered judgment thereon, from which the plaintiff appeals.

Edgar L. Wood, for the appellant.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *E. P. Vilas.*

DODGE, J. The peril to which plaintiff's decedent was subjected, from which he suffered, and which constituted the negligence charged upon the defendant, was that resulting from his standing upon two transverse timbers, respectively six inches and four inches of surface, at an elevation of nineteen feet above the ground, while he indulged in the exertion necessary to the prying of the belt from the pulley. It is difficult to conceive of a peril more obvious to the man of ordinary intelligence. The size of those timbers, the insecure foothold thereby afforded, and the danger of falling, either from slipping or loss of balance under the exertion necessary to the throwing of the belt, are matters completely within the common knowledge of all. These conditions had been before the eyes of the deceased for some two months, while his duties required him to move about upon this and similar scaffolding; but, whether they had or ought to have been noticed by him during that period, they were plain before his eyes at the moment when he exposed himself to them. When he stepped from the broader foothold and safeguarding railing, which were upon the north side of the pulley, around onto this less secure and unprotected place, he must have

done so with full knowledge or blind eyes. The effect of this view upon his right to charge his employer with liability for the ordinary and natural result of his act is so well settled, as matter of law, that it needs barely statement. He thereby assumed the risk of such result, and, whether there be or be not negligence on the part of the master in providing such appliances, his own contributory negligence in attempting to work under such circumstances must preclude recovery. *Helmke v. Thilmany,* 107 Wis. 216, 83 N. W. 360; *Hencke v. Ellis,* 110 Wis. 532, 86 N. W. 171.

Appellant urges upon us a somewhat philosophical discussion which may be found in some text-books, illustrated by decisions from various courts, involving the inquiry whether the doctrine of the employee's assumption of the risks known to him, as a defense to the employer's liability for negligence, rests upon contract or upon the idea of negligence in the employee; contending for the former view, and thereon predicating the deduction that, as deceased was legally a minor, he could not be bound by his own contracts. Such a discussion before this court is certainly academic. By a long line of cases it has become settled here that so-called assumption of the risk is but a phase of contributory negligence. Conceding that the employer negligently furnishes an unsafe place, the employee, who with knowledge consents to work therein, is himself guilty of negligence which is obviously as proximate a cause of any injury to him as is the maintenance of the place itself; hence he is precluded from recovery against his employer for those results. The citation of a few of the later cases may certainly relieve us from the necessity of a reconsideration of that subject: *Darcey v. Farmers' L. Co.* 87 Wis. 245, 58 N. W. 382; *Hazen v. West Superior L. Co.* 91 Wis. 208, 64 N. W. 857; *Powell v. Ashland I. & S. Co.* 98 Wis. 35, 73 N. W. 573; *Dugal v. Chippewa Falls,* 101 Wis. 533, 77 N. W. 878.

Error is assigned on exclusion of testimony tending to

show that other places in the factory, where deceased had previously had occasion to cast off belts, were provided with twelve-inch planks to stand on, and a railing. From this ruling we can discover no prejudice to appellant. Whether or not it might have tended to prove the place of injury unusually or negligently dangerous, it in no way tended to overcome the undisputed fact that the situation was entirely obvious. If it served to prove or enhance defendant's negligence, it in no way tended to lessen that of the deceased, upon which the nonsuit was predicated, and is now approved.

By the Court.—Judgment affirmed.

MAYER, Respondent, vs. GOLDBERG and another, Appellants.

November 29—December 16, 1902.

Contracts: Construction: Traveling salesmen.

A yearly contract of employment of a traveling salesman provided for monthly salary, expenses, and a commission on all sales over $24,000, and stipulated that either party might cancel the contract on giving ten days' notice, but, at the close of the ten days' period that "the accounts to be settled on the same basis as though the full period of the contract had elapsed." *Held,* that the salesman, on the termination of the contract before the end of the year, was entitled to commission on all sales in excess of $2,000 a month.

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

This is an action to recover $582.94, alleged to be due the plaintiff for the breach of a contract entered into between the parties September 30, 1899, wherein and whereby the plaintiff agreed to devote his entire time and attention from December 31, 1899, to December 31, 1900, as a traveling

salesman, to sell goods for the defendants in such territory as should be allotted to him, and in all respects to devote his whole time and attention to the interests of the defendants; that the defendants therein agreed to allow the plaintiff $100 per month during that period, and also during actual travels all necessary expenses, viz., $25 per week in cash, and *also all mileage and excess books.* The defendants agreed therein to allow the plaintiff "a commission of five (5) per cent. on all sales over $24,000," except on Angora and ice wool yarns, on which the defendants were to allow the plaintiff "a commission of two and one-half per cent. in cases where orders" should be accepted, the goods actually shipped and delivered, and the accounts collected by the defendants. The contract also contained this provision:

"Both parties to this agreement have the privilege to cancel this contract by giving ten (10) days' notice in writing, and at the close of said period the accounts to be settled on the same basis as though the full period of this contract had elapsed."

After alleging the business and relationship of the parties, and the making of such contract, the complaint alleges, in effect, that pursuant to said agreement the plaintiff entered into the employment as such traveling salesman December 31, 1899, and continued in such employment until June 20, 1900; that June 9, 1900, the defendants served upon the plaintiff notice that said contract with defendants as a traveling salesman was therewith canceled, and that from and after June 20, 1900, the plaintiff was discharged from the employment of the defendants, and inclosed their check for $100, the balance due the plaintiff for June, 1900, and that any other sums due and owing to the plaintiff from the defendants would be paid according to contract; that from December 31, 1899, to June 20, 1900, the plaintiff continued in the employ of the defendants, and, pursuant to the contract, sold $212.75 worth of merchandise known as "Angora

Ice Wool," and $23,558.63 worth of other merchandise; that January 2, 1901, the defendants furnished to the plaintiff, at his request, a statement showing the amount of goods sold by him pursuant to the said contract, as mentioned; that the plaintiff had received for his services so performed the sum of $600.30, in cash and merchandise, and no more; that there is due to the plaintiff from the defendants, pursuant to said contract for services performed, and for commissions upon the merchandise sold, as mentioned, the sum of $582.94, for which the complaint prays judgment, together with costs of this action.

The defendants answered by way of admissions, denials, and counter allegations, to the effect that June 3, 1900, they received from the plaintiff his resignation, to take effect September 1, 1900; that April 15, 1900, the plaintiff, in violation of such contract, and two other employees of the defendants entered into an agreement to become partners in the same kind of business as the defendants, and to sell and deal in the same kind of goods and merchandise, to commence September 1, 1900, by reason of which the defendants suffered damage in the sum of $500, and also alleged similar facts by way of counterclaim.

The plaintiff replied to such counterclaim, denying each and every allegation therein alleged.

May 17, 1901, the cause was referred to a referee, to hear, try, and determine. At the close of the trial the referee found the making of the contract, the services rendered, the amount of sales made, the resignation of the plaintiff, and his discharge by the defendants, as mentioned; (10) and also found that the clause of the contract quoted was clear and unambiguous, and not subject to double construction; that by its terms the defendants were only to pay a commission on sales in excess of $24,000, irrespective of when the contract should be terminated; (13) that the sales obtained through the solicitation and service of the plaintiff from December 31,

1899, to June 20, 1900, were only $23,776.38; (16) that the allegations of the complaint were true, except as to commissions, which were not sustained; (17 and 18) that the allegations of the answer as to the plaintiff's failure to devote his whole time to the business of the defendants were not sustained by the evidence; (19) that there is nothing due the plaintiff for commissions or otherwise; (20) that there is nothing due the defendants for failure of the plaintiff to comply with the contract. And as conclusions of law the referee found that the complaint should be dismissed, and that the defendants take nothing by reason of their counterclaim. On motion to modify and confirm such report of the referee, the trial court concurred, substantially, with the facts found by the referee, except in construing the clause of the contract quoted above so as to allow the plaintiff commissions on all sales in excess of $2,000 per month. In modifying such report, the late Judge ELLIOTT said:

"It is the duty of the court to put itself so far as possible in the position of the contracting parties, and from the language of the contract itself, the subject-matter, and the surrounding circumstances, to determine what they contemplated at the time of making the agreement. There is nothing vague or ambiguous or that calls for construction in the contract, except the phrasing of the stipulation which provides that when the employment is terminated within the year the accounts shall 'be settled on the same basis as though the full period of the contract had elapsed.' I apprehend that the words 'on the same basis' are equivalent to 'on the same terms' or 'conditions' or 'principle.' What were the 'terms' or 'conditions' of the full period? Evidently, $100 per month, and a commission upon sales in excess of $24,000. It is significant that the full period was twelve months, and that commissions were payable when the sales average more than $2,000 per month for such twelve months. The employment being terminated in less than the full period, the accounts were to be settled upon the same 'basis,' 'terms,' or 'conditions' as pertained to the full period; in other words, defendants were to pay the commissions in case the sales averaged

over $2,000 per month. Only by such a construction is it possible to give meaning to the words 'the accounts to be settled.' What accounts? Plaintiff's salary was payable monthly, and did not call for a settlement, so, unless the words 'the accounts to be settled' refer to commissions, they can refer to nothing. . . . Unless this stipulation was inserted for the benefit of plaintiff, it is wholly needless, since, except for it, defendants would not be obligated to pay any commission until sales had been made and collected exceeding $24,000. For the reason stated, I am brought to the conclusion that the parties contemplated and intended that plaintiff should receive a commission whenever his sales and the collections thereupon averaged more than $2,000 per month for the full term of the one year, or such part thereof as he continued in the employ of defendants under the contract. The findings and conclusions of the referee will be amended as moved by the plaintiff, and as amended will be confirmed, and judgment entered accordingly."

From the judgment entered upon such amended findings and conclusions, the defendants bring this appeal.

Leopold Hammel, for the appellants.

For the respondent there was a brief by *Turner, Pease & Turner,* attorneys, and *J. H. Turner,* of counsel, and oral argument by *W. J. Turner.*

CASSODAY, C. J. By the terms of the contract, the plaintiff was to have a salary and certain expenses. He was to have "a commission . . . on all sales over $24,000." The decision must turn upon the construction to be given to the additional clause of the contract quoted in the statement of facts, to the effect that, if either party canceled the contract by giving the notice in writing mentioned, then at the close of that "period the accounts" between the parties were "to be settled *on the same basis* as though the full period of this contract had elapsed." The plaintiff had been employed under the contract less than six months when the defendants canceled the same by giving the requisite notice. During that time his sales amounted to a little less than $24,000. The

defendants contend that he is entitled to no commissions, because his sales did not exceed that amount, even though they might have been double that amount had the plaintiff continued in the employment of the defendants to the end of the year. In support of such contention, counsel seem to rely on *Stern v. Rosenheim,* 67 Md. 503, 10 Atl. 221; *Atkins v. Keener,* 109 Ala. 143, 19 South. 402; *Thompson v. Saco W. P. Co.* 114 Mass. 159; *Kelly v. Carthage Wheel Co.* 62 Ohio St. 598, 57 N. E. 984. But in none of these cases did the contract contain any provision similar to the clause in question. The contract in the Maryland case is quite similar to what the contract in the case at bar would have been, had that clause been omitted,—with this difference: That the employer in that case reserved the right to terminate the contract at the end of six months if the services were unsatisfactory, and in that event the employee was "to receive no further compensation." It is well settled that in construing a contract all of its terms must be considered. *Jacobs v. Spalding,* 71 Wis. 177, 189, 36 N. W. 608; *Gibbons v. Grinsel,* 79 Wis. 369, 48 N. W. 255. The intention of the parties is to be gathered, if possible, from the language employed. *Id.; T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 671, 65 N. W 513; *Braun v. Wis. Rendering Co.* 92 Wis. 247, 66 N. W. 196; *Mississippi R. L. Co. v. Wheelihan,* 94 Wis. 96, 98, 99, 101, 68 N. W. 878; *Wisconsin M. & F. Ins. Co. Bank v. Wilkins,* 95 Wis. 115, 69 N. W. 354. Thus it is held by the supreme court of the United States:

"In the interpretation of any particular clause of a contract, the court is required to examine the entire contract, and may also consider the relations of the parties, their connection with the subject-matter of the contract, and the circumstances under which it was made." *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.* 143 U. S. 596, 609, 12 Sup. Ct. 479, 36 L. Ed. 277; *Winona & St. P. L. Co. v. Minnesota,* 159 U. S. 531, 16 Sup. Ct. 83, 40 L. Ed. 247.

Under the adjudications cited, and many others which might be cited, the court is not at liberty to eliminate from the contract the particular clause in question, any more than it would be at liberty to add new provisions to the contract. The language of the late Judge ELLIOTT in construing the contract is given in the foregoing statement of facts. We fully concur in what he there said, and it need not here be repeated. The words, "at the close of said period the accounts to be settled on the same basis as though the full period of this contract had elapsed," manifestly mean what he held they do mean.

By the Court.—The judgment of the circuit court is affirmed.

COXE BROS. & CO., Appellant, vs. MILBRATH, Respondent.

November 29—December 16, 1902.

Appeal and error: Practice: Immaterial error.

1. Where technical error appears in the record the judgment appealed from will not be reversed unless some prejudice thereby results to the appellant.
2. Where out of three questions of a special verdict, one question and its answer fully supports the judgment appealed from, and it cannot be discovered that either the submission of the other two questions or the admission of evidence upon the issues embraced in them could have affected the answer to that question, the appellant is not prejudiced thereby.

APPEAL from a judgment of the superior court of Milwaukee county: GEO. W. BURNELL, Judge. *Affirmed.*

Action upon a guaranty made by defendant, and delivered January 18, 1896, in the following words: "I hereby extend the guarantee of O. Kornreich's account, which expires today, to an amount not exceeding twenty-five hundred dollars, until May 1st, 1897," which guaranty, upon a former appeal, was held valid by this court as to all coal sold to Korn-

reich after January 18th. 110 Wis. 499, 86 N. W. 174. On that date there was a balance due from Kornreich in the sum of $3,528.64, and thereafter coal was sold to him by the plaintiff to the amount of $1,932.61. During the same period Kornreich received credit for money, commissions, etc., to the amount of $1,817.82, and in addition there was paid to plaintiff's agent Kornreich's promissory note for $2,000, indorsed by the defendant, which was afterwards paid in due course. The questions litigated were with reference to the application of these several payments, it being claimed on behalf of the defendant that he signed the note, intrusted same to Kornreich to be applied on the guaranty, and that it was delivered by Kornreich and received by plaintiff's agent Kuesel upon the express understanding that it was to so apply. It was also claimed by defendant that at the time of making the guaranty plaintiff's agent agreed that all sums paid by Kornreich on account should apply on the guarantied portion of his indebtedness. Both of these contentions were denied by the testimony of the agent Kuesel. The court submitted a special verdict of three questions: (1) Was the note delivered by defendant to Kornreich with instructions that it be applied on the guaranty? (2) Was the note delivered to Kuesel with directions that it be applied on defendant's guaranty? (3) Was it understood by Milbrath and Kuesel at the time of making the guaranty that all payments made on Kornreich's account were to be applied thereon? All these questions were answered in the affirmative. After motion for a new trial on the minutes of the judge, judgment was entered for the defendant, from which the plaintiff appeals. He assigns as error—First, the submission of the first and third questions in the special verdict; second, refusal to strike out evidence admitted in support of the third question; and, third, the admission of evidence in support of the first question.

For the appellant the cause was submitted on the brief of

Van Dyke & Van Dyke & Carter, and for the respondent on that of *Julius E. Roehr.*

DODGE, J. Were it conceded that each of the appellant's assignments presented a technical error of the trial court, which it is not, still we should not be at liberty to reverse for that reason unless we could discover some prejudice thereby resulting to him. The second question and its answer, if not affected by any error, fully support the judgment. If the $2,000 note was delivered to the plaintiff's agent expressly for the purpose of application upon the defendant's guaranty, it more than satisfied all liability established thereon. Upon most careful consideration, we find ourselves unable to conceive how the jury's conclusion upon that question could have been affected by either of the acts assigned as error. The answer to that question depended upon a square conflict of evidence as to the existence and details of a transaction between Kornreich and Kuesel. Did Kornreich deliver that note to Kuesel, and did he inform him upon such delivery that it was for application upon the guaranty? If the jury were properly instructed, their conclusion could have in no wise been affected or varied by considerations whether the note was delivered by defendant to Kornreich with certain instructions, or whether, at the time of entering into the guaranty some months before, certain promises as to application of payments were made by Kuesel. That the jury were properly instructed we must assume from the fact that appellant makes no complaint either of the instructions given or of the refusal of any requests to instruct. Indeed, he does not even print the instructions given or requested. Being thus unable to discover that either the submission of the other two questions or the admission of evidence upon the issues embraced in them could have affected the answer to the second question, we cannot say that appellant was thereby prejudiced in any respect affecting the judgment appealed from.

By the Court.—Judgment affirmed.

WEEKS, Appellant, vs. ROBERT A. JOHNSON COMPANY, Respondent.

December 1—December 16, 1902.

Sale of chattels: Order: Subsequent correspondence: Contracts: Written and printed conditions: Acceptance: Lien of consignee: Waiver: Agency: Extras.

1. Defendant ordered a machine through plaintiff's agent, the written order stipulating that the machine was guaranteed to give "entire satisfaction." Plaintiff wrote defendant asking for "confirmation of the order," stating that he did not like the term "entire satisfaction." Defendant in reply stated that, after being thoroughly tested, if the machine proved as represented he would keep it, and pay for it, and referred to the original written order as a "conditional order." *Held*, that the subsequent correspondence in no way changed the terms of the order.
2. A contract for the sale of a machine was on a printed form, and the written part of the order stated that entire satisfaction was guaranteed. On the margin there was printed "Goods shipped at buyer's risk" and "all claims for deficiencies must be made within fifteen days after receipt of goods." *Held*, that such printed matter did not destroy or change the terms and conditions written in the order.
3. Defendant purchased a machine from plaintiff on condition that it worked satisfactorily. In attempting to use it he spoiled considerable material, and, at plaintiff's request, had a duplicate part made for one portion. After having decided that it was not satisfactory, defendant offered to return the machine to the plaintiff on receipt of payment for the material damaged and his expenditures for the duplicate part. Sec. 3345, Stats. 1898, provides that "every consignee of property shall have a lien thereon for any money advanced by him to or for the use of the person in whose name the shipment of such property is made." *Held*, that the mere fact that defendant proposed to return the machine upon receipt of payment for his whole claim, including that for damaged material for which he had no lien, was not a waiver of the lien for his expenditures in supplying the duplicate part.
4. In such case the retention of the machine did not amount to an acceptance.
5. Defendant ordered a machine of plaintiff's agent, to be accepted if satisfactory, and, having difficulty with it, notified plaintiff, who answered that he had written the agent; that the agent

would go and see the machine, and expressed confidence that matters would be satisfactorily arranged. Plaintiff testified that he had "turned the matter over to" the agent. When defendant made claim for certain damaged material, plaintiff stated he would see the agent, that he had nothing to lose, and that he would look to the agent for the claim. *Held*, that a subsequent notice by defendant that the machine was unsatisfactory and would be returned, was properly sent to the agent.

6. Defendant ordered from plaintiff a "chocolate dipping machine," agreeing to purchase it if it did the work it was represented to do. Plaintiff suggested that, in order to run the machine to its guaranteed capacity, defendant should have four extra screens, which defendant ordered and plaintiff furnished. The screens constituted a part of the machine, and were of no use in any other machine or for any other purpose. *Held*, that there was no foundation for extra charge for the screens.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an action to recover $1,000, the purchase price of a chocolate dip machine, f. o. b. Philadelphia, and $45, the expenses of a man going to Milwaukee to set up the machine, and $40 for four special screens, reasonably worth and of the market value of $40, and interest on the total amount from April 10, 1900. The defendant answered by way of admissions, denials, and counter allegations, and set up a counterclaim to the effect that the plaintiff warranted and guarantied the machine to perform the work well for which it was intended, and be of great value and assistance to the defendant in the manufacture of confectionery, and that the machine in its work would be and prove to be entirely satisfactory to the defendant; that, relying upon such guaranty, the defendant agreed to test the machine in its business, and did thereafter thoroughly try and test the machine in the manner, way, and form as directed by the plaintiff, and in so doing destroyed and rendered worthless material of the value of $114.04; that such test proved the machine to be, and it was, utterly worthless and of no value, and demanded judgment for the

$114.04, besides the costs and disbursements of this action. The counterclaim was put in issue by a reply. At the close of the trial a verdict was directed in favor of the defendant. From the judgment entered thereon dismissing the action upon the merits, and for $35.52 costs, the plaintiff brings this appeal.

The written order for the machine is as follows:

"All claims for deficiencies must be made within 15 days after receipt of goods."

Order Blank

"For Labor Saving Confectionery Machines.

By John Werner,

Rochester, N. Y., U. S. A.

Terms, net 30 days. Goods shipped at buyer's risk.

Date, November 24, 1899.

Ship to *Robert A. Johnston Co.*, Milwaukee, Wis.

Number of Articles.	Description of Goods.	Price.
One	chocolate dip machine, f. o. b. Philadelphia. Capacity, 1,000 to 3,000 lbs. a day, and exclusive right to use it in Milwaukee for one year, *R. A. Johnston Co.* to pay R. R. fare for man to put up machine, *if machine accepted;* otherwise machine returned f. o. b. Milwaukee, Wis. Entire satisfaction guaranteed.	$1,000.00

J. W. WERNER."

To that order the plaintiff wrote the defendant under date of November 28, 1899:

"We are in receipt of an order to our Mr. Werner for a chocolate dipping machine, and before shipping same would like your confirmation. We don't like the term 'entire satisfaction.' It is very broad, although we have confidence that we can give you all we claim and more. We cannot afford to take big chances, as the machine weighs over a ton. We will refer you to" several persons therein named.

The defendant replied under date of December 1, 1899:

"We do not quite understand what you mean by wanting our confirmation of the order for machinery. We had a perfect understanding with Mr. Werner when he was here, and he seemed to be a very honest and honorable gentleman. When the machinery arrives and is thoroughly tested, *and if it proves as represented,* we will be pleased to keep it, and pay

for it, and I have no doubt that Mr. Werner was well satisfied that he was doing business with honorable people when he did business with us. We always try to buy the very best thing there is on the market in machinery, and, if Mr. Werner did not make us believe that what you had was the best, he probably would not have left with our conditional order. We will forward to you to-day by mail the molds, as requested, and will write you at the same time what particulars may be necessary."

December 13, 1899, the defendant wrote the plaintiff:

"For the present we only wish to make the drop same as sample sent you, but, as we wish to run this machine to its capacity, you had better make us four extra screens. If the machine works as represented, we will want other designs, but for the present, in order to get started, we prefer this one mold only."

December 14, 1899, the defendant wrote the plaintiff:

"We have decided to have you make the four extra screens ordered,—one each as per sample we are sending you under separate cover."

January 13, 1900, the defendant informed the plaintiff that the machine had arrived at Milwaukee. The plaintiff thereupon came to Milwaukee and set up the machine, and then proceeded to test it, but failed to make it work satisfactorily to the defendant or to his own satisfaction. The plaintiff then suggested that he would send for another box to run the baskets through, and put a steam coil therein to keep the sieves warm, and the defendant's man said, "All right." After the plaintiff left, the defendant received a postal card from him postmarked January 18, 1900, at Chicago, as follows:

"I think best to have you get the brace hot box made there, and then you will have it as you wish; it will be quite a delay should I ship from home. Use the one you have for the perforated one or inside, and advise me how it worked as soon as you have it in shape. Wishing you abundant success,

"Yours, W. H. WEEKS."

The defendant had the box made and put into the machine. It was a part of the machine,—similar to the one on when the machine came,—but the machine gave but very little, if any, better success. January 23, 1900, the defendant wrote to the plaintiff:

"We discovered yesterday that all of the chocolate drops we have turned out on your machine taste after paint, and it is impossible for us to send out the goods; they are a dead loss on our hands. Upon investigating your machine thoroughly, we find that what you stated to us was enamel on the inside of the machine turns out to be paint. The machine cannot be used in its present condition, and we cannot do anything with it until we hear from you. Kindly let us hear from you promptly."

The plaintiff replied under date of January 27, 1900, and after some discussion, among other things said:

"Will you kindly let us know the amount of your loss, and send us samples of the drops, as we might be able to dispose of them in Chicago or in our city. Mr. Werner, to whom we have written, tells us that he will be in your city soon, and is confident matters will be satisfactorily arranged. You can remove enamel by first taking alcohol, then turpentine, and thoroughly cleansing with a strong solution of potash. Trusting you will have no further trouble, we remain, very truly yours."

February 1, 1900, the defendant acknowledged receipt of that letter, and wrote to the plaintiff:

"We have on hand about 340 lbs. of chocolate that was used in your machine that we have set aside; also about 300 lbs. of chocolate drops as per sample we are sending you under separate cover. If you will test one of these, you will readily detect the taste in question. We hope that Mr. Werner will be able to visit Milwaukee very shortly, as we have decided to let the machine rest until he calls."

April 10, 1900, the defendant wrote to the plaintiff:

"The chocolate machine which we received from you on trial, as per agreement dated November 24th, we are obliged to reject. We inclose bill covering various items of expense,

including chocolate and chocolate drops damaged by paint, of which we notified you some time ago. Upon receipt of your check for this amount ($114.04) we will be pleased to return your machine."

July 30, 1900, this action was commenced.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. H. Remington.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* and oral argument by *W. C. Quarles.*

CASSODAY, C. J. By the terms of the order the defendant was to have the "exclusive right to use" the machine in Milwaukee "for one year" by paying the railroad "fare for man to put up machine, if machine accepted; otherwise machine returned f. o. b. Milwaukee, Wis. Entire satisfaction guaranteed." In response to that order the plaintiff stated that, before shipping the machine, he would like the defendant's "confirmation," and that he did not "like the term 'entire satisfaction' "; but there was no refusal to ship the machine upon the terms expressed in the order. This is made certain by the defendant's letter of December 1, 1899, in reply, in which it is stated that: "When the machinery arrives and is thoroughly tested, and if it proves as represented, we will be pleased to keep it, and pay for it;" and that if the plaintiff's agent, Werner, had not made the defendant believe that the plaintiff's machine was the best, he probably would not have obtained the defendant's "conditional order." The subsequent correspondence in no way changed the terms of the order. On the contrary, some of the letters and the conduct of the parties tended to confirm the order as written. That order was a printed blank filled up in writing. There was printed at the top and above the date: "Terms, net 30 days. Goods shipped at buyer's risk;" and on the side: "All claims for deficiencies must be made within 15 days after receipt of goods." Such printed matter cannot be allowed to

destroy or change the terms and conditions written in the order. 1 Greenl. Ev. (15th Ed.) § 278. See *State ex rel. Blodgett v. Eagan,* 115 Wis. 417, 91 N. W. 984, and cases there cited. It follows that the plaintiff shipped the machine upon the terms and conditions written in the order, to the effect that it was to be satisfactory to the defendant, and paid for if accepted by the defendant; otherwise returned f. o. b. Milwaukee. It never worked to the satisfaction of the defendant. The failure of the machine to fulfill the guaranty seems to have been recognized by the plaintiff when he tested the machine about the middle of January, 1900, and also in his letter of January 27, 1900.

2. But it is claimed that the defendant's remedy for such failure to fulfill the guaranty was to return the machine f. o. b. Milwaukee, as prescribed in the contract; and that the defendant's letter of April 10, 1900, rejecting the machine so received by the defendant on trial, and inclosing a "bill covering various items of expense, including chocolate and chocolate drops damaged by paint," of which the defendant had previously notified the plaintiff, amounting in all to $114.04, and stating that upon receipt of that amount the defendant would return the machine, was, in legal effect, an acceptance of the machine. It appears, and is undisputed, that $21.46 of the items included in that bill was expended by the defendant, at the plaintiff's request, in the purchase of material which was actually used in the manufacture of the rack or box mentioned, and which became a part of the machine. The statute declares:

"Every consignee of property shall have a lien thereon for any money advanced . . . by him to or for the use of the person in whose name the shipment of such property is made, and for any money . . . received by such person for his use, unless he shall before advancing any such money . . . or before it is so received for his use, have notice that such person is not the actual owner thereof." Sec. 3345, Stats. 1898.

Under this statute it is very obvious that the defendant, as such consignee, had a lien for the moneys so advanced, and was entitled to retain the possession of the machine until such moneys were repaid or tendered. The mere fact that the defendant's letter of April 10, 1900, was sent to the plaintiff's agent, John Werner, instead of the plaintiff, is without significance. The order was given to Werner. The plaintiff testified that he had "turned the matter over to Werner"; and also wrote the defendant, January 27, 1900, that he had written Werner, and that he would be in Milwaukee soon, and was "confident matters" would "be satisfactorily arranged"; and, after receiving a copy of the bill mentioned, the plaintiff stated to the defendant, in effect, that he would see Werner, who made the agreement with the defendant; that the plaintiff had nothing to lose, and would look to Werner for the claim. The mere fact that the defendant proposed to return the machine upon the receipt of a check for the whole bill was not a waiver of its lien for the particular bill mentioned. Thus, it is stated in a standard work:

"Where a holder of goods detains them for two claims, as to one of which he has a lien and as to the other not, the owner must tender the proper amount, unless the holder either expressly or by fair implication dispenses with the necessity of a tender. Thus, where one who has a particular lien on property claims in addition thereto a general lien thereon, to which he is not entitled, and refuses to surrender the property to the owner on that account, he does not by so doing waive the necessity of a tender of the amount secured by the particular lien." 19 Am. & Eng. Ency. of Law (2d Ed.) 33.

The plaintiff made no such tender.

3. The plaintiff contends that the four extra screens were of the value of $40, which more than counterbalanced the lien claim. The machine was guarantied to have a capacity of from one to three thousand pounds per day. The plaintiff suggested that the defendant ought to have more sieves,—

four extra screens,—or the defendant could not turn out the quantity of work guarantied. The defendant informed the plaintiff, December 13, 1899, that the defendant wished "to run this machine to its capacity," and that the plaintiff therefore had better make for the defendant four extra screens; and December 14, 1899, the defendant notified the plaintiff to make the four extra screens,—one each, as per sample sent. The four screens were necessary in order to ascertain, by a proper test, whether the machine had the capacity guarantied. They constituted a part of the machine, and were of no use to any other machine or for any other purpose. It follows that there is no foundation for the extra charge for the four screens.

4. As the machine was never accepted, the defendant was not liable "to pay R. R. fare for man to put up machine," as provided in the contract; and hence the plaintiff can take nothing by reason of that item alleged in the complaint. We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

DALLMAN and others, Respondents, vs. CLASEN and others, Appellants, and ROCKWELL MANUFACTURING COMPANY and others, Respondents.

December 1—December 16, 1902.

Mechanics' liens: Subcontractor of subcontractor: Conspiracy to defraud: Evidence.

1. Secs. 3314, 3315, Stats. 1898, give a mechanic's lien to principal contractors, subcontractors, material men and laborers, but not to a subcontractor of a subcontractor. The owner of land contracted with M. to build a building thereon for $1,000. M. sublet the entire contract to L. for $1,000, and L. sublet different parts of the work to various parties, who sought to establish

their liens on the theory that the subletting to L. was fraudulent, and for the express purpose of placing them in the relation of subcontractors of a subcontractor. *Held*, that even if by reason of a conspiracy it could be held in equity that L. was in fact the principal contractor (a proposition not decided), participation of the owner in the conspiracy is absolutely essential to bind him.

2. In such case the fact that the owner knew that L., instead of M., was in fact erecting the building, is entirely consistent with good faith, and would not support a finding of conspiracy based on that fact alone.

3. In such case proof that L. made his bid with but an hour's deliberation does not justify the conclusion of fraud in the contract.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This was a consolidated action brought for the foreclosure of mechanics' liens in favor of alleged subcontractors. The facts, as shown by the evidence, are in brief that on July 27, 1900, the appellant *Clasen,* who owned a building lot in the city of Milwaukee, made a written contract with the appellant *Mindeman,* wherein *Mindeman* agreed to build a house upon *Clasen's* lot, and furnish all material therefor, for the sum of $1,000; that upon the following day *Mindeman* sublet the contract to the defendant *John Lavies,* who by written contract agreed with *Mindeman* to construct the building, and furnish all material and labor therefor, for the sum of $1,000; that thereafter *Lavies* made written contracts with the lien claimants herein to furnish material and labor in the construction of the house as follows: With *Dallman & Dallman,* for mason work and material, $280; with *Wolffersdorf,* for painting, $97; with *Porman,* for plastering, $75; with the *Rockwell Manufacturing Company,* for millwork, $225; with *Geskerman,* for tinwork, etc., $53.48; that the house was completed, and the contracts made by the lien claimants with *Lavies* fully performed, and that after such performance *Lavies* gave orders to the aforesaid lien claim-

ants, addressed to *Mindeman,* and directing him to pay the lien claimants the respective amounts due them, and such orders were all specified upon their faces to be in full payment of the claims for which they were given; that *Mindeman* refused to pay the orders; that *Clasen* paid the full contract price of the house to *Mindeman,* the last payment being made February 2, 1901; that *Mindeman* paid *Lavies* the entire contract price before the commencement of this action, but that *Lavies* never paid any of the lien claims; that notices of subcontractors' liens were served in due time, and lien claims were properly filed by all of the claimants. The plaintiffs, by their complaint, claimed that the contract between *Mindeman* and *Lavies* was simply a fraudulent attempt to deprive the plaintiffs of their pay and of their right to mechanics' liens. This claim of fraud was denied by the defendants. The action was tried before a referee, who found that the lien claimants were entitled to liens upon the property; and the report was confirmed, and personal judgment rendered in favor of the claimants against *Clasen* and his wife, *Mindeman,* and *Lavies,* as well as judgment of foreclosure of liens upon the real estate. From this judgment the defendants *Clasen* and *Mindeman* appeal.

Charles J. Weaver, for the appellants.

For the respondents there were separate briefs by *A. J. Eimermann,* for the plaintiff respondents, *John H. Moss,* attorney, and *Winkler, Flanders, Smith, Bottum & Vilas,* of counsel, for the respondent *Rockwell Manufacturing Company,* and *Edgar L. Wood,* for the respondents *Geskerman,* and oral argument by *Mr. Eimermann* and *Mr. E. P. Vilas.*

WINSLOW, J. Our mechanic's lien statute gives the right of lien to principal contractors, subcontractors, and the employees of either, but not to a subcontractor of a subcontractor. Stats. 1898, secs. 3314, 3315. In the present case the lien claimants and respondents were apparently subcon-

tractors of a subcontractor, and hence not entitled to liens, and the simple question to be determined is whether any facts appear in the case which in equity entitle them to be treated as subcontractors. The referee found as facts that the contract by which *Mindeman* sublet the entire work to *Lavies* was made by *Mindeman* and *Lavies* with the intent of obtaining from the lien claimants their labor and materials without payment, and depriving them of their rights of lien; that *Clasen,* the owner, saw and knew that *Lavies* was erecting the building, instead of *Mindeman;* and, as a conclusion of law, that *Lavies* became, in equity and essentially, the principal contractor for the building, instead of *Mindeman,* and that the lien claimants thus became subcontractors, and entitled to liens. It may well be that, had there been a conspiracy formed, to which *Clasen, Mindeman,* and *Lavies* were parties, that the building contract was to be nominally let to *Mindeman,* and that *Lavies* was then immediately to take the contract for the purpose of defeating liens of materialmen by thus making them subcontractors of a subcontractor, a court of equity would rightfully hold that *Lavies* was in fact the principal contractor, and hence that the lien claimants were subcontractors, although this proposition is not decided. Conceding it to be correct, however, it is clear that the participation of *Clasen,* the owner, in the conspiracy, must be absolutely essential. He cannot be prejudiced, nor his land saddled with a lien, by the acts of third parties in which he did not join. This seems fundamental and elementary. It is not found that *Clasen* had any knowledge of or participation in the arrangements between *Mindeman* and *Lavies,* nor is there any evidence of such knowledge or participation. He knew that *Lavies* was in fact erecting the building, but this is entirely consistent with good faith on the part of *Clasen.* No finding of fraud or conspiracy can be based on this fact alone. So far, therefore, as *Clasen* is concerned, there is absolutely no evidence tending to show that the lien

claimants are entitled to be considered as anything more than subcontractors of a subcontractor.

As to the personal judgment against *Mindeman,* it must be based upon the supposed fraudulent character of the subcontract between *Mindeman* and *Lavies,* if upon anything. Really the only proof that this was not a *bona fide* contract was the fact that *Lavies* made his bid with but about an hour's deliberation. It was, however, a very small house, as appears from the price, and hence one upon which a competent builder might make estimates in a very brief time. Fraud should be clearly and satisfactorily proven. We have been unable to find any evidence which would justify the conclusion of fraud in this contract.

By the Court.—Judgment reversed as to the appealing defendants, and action remanded, with directions to dismiss the complaint as to such defendants.

THE CITY OF WAUWATOSA, Respondent, vs. DREUTZER, Appellant.

December 1—December 16, 1902.

Municipal corporations: Streets: Encroachments: Statutes: Notice: Equity: Mandatory injunction.

A municipal corporation can maintain an action in equity to obtain a mandatory injunction compelling the removal of an encroachment upon one of its public streets. Its right so to do is not dependent upon a prior making and service of the statutory order to discontinue the encroachment under sec. 1330, Stats. 1898, requiring that the notice shall "specify the width of the road, the extent of the encroachment, and the place or places in which the same may be, with reasonable certainty."

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to compel the removal of an alleged obstruction in one of the public streets of the plaintiff city. The allegations of the complaint are to the following effect: Plaintiff is a duly organized city under the laws of this state. One of its public streets is East Milwaukee avenue. A portion thereof lies between and at right angles and is connected with First avenue at one end and Wauwatosa avenue at the other. The center line of such portion is described as follows: Commencing at the center line of Wauwatosa avenue, at a point in the west line of section 22, town 7 north, range 21 east, 273.96 feet south from the northwest corner of the southwest quarter of said section, running thence south 85 degrees and 15 minutes east 382.51 to the intersection of the center line of First avenue. That part of East Milwaukee avenue in question is sixty-six feet wide. Defendant owns about one acre of land, having a frontage of about 134.96 feet on the north side of said avenue at the place in question. She is a married woman residing with her husband on such property. It is her separate property. She has constructed along the entire front thereof an earth terrace, and a fence which stands about four and one half feet south of the lot line, encroaching upon the street to that extent. That part of the street so appropriated is described as follows: Commencing at a point in the north line of East Milwaukee avenue 240.80 feet south, and south 85 degrees 15 minutes east 217.65 feet from the northwest corner of the southwest quarter of section 22, town 7 north, range 21 east, running thence south 85 degrees 15 minutes east on the north line of said avenue 134.90 feet to a point, thence south four and one half feet to a point, thence north 85 degrees 15 minutes west parallel with such line 134.90 feet to a point, thence north four and one half feet to the place of beginning.

July 2, 1901, before the commencement of this action, the common council of plaintiff duly resolved that defendant be required, and she was accordingly ordered, to remove said

encroachment upon the street, and directed the city marshal to serve a copy of the resolution upon her, and directed the city attorney, in case of her neglect or refusal to comply with such order within thirty days after such service, to commence an action in the name of the city for the removal of the encroachment. A copy of such resolution and order was accordingly served upon defendant. Such copy, as regards the description of the premises encroached upon and the nature of the encroachment, was as follows:

"Along a portion of East Milwaukee avenue, in front of the above-described premises, an iron fence, extending from First avenue to the extended west boundary line of said *Alice H. Dreutzer's* property, which said fence stands entirely upon East Milwaukee avenue and several feet south of the East Milwaukee avenue lot line of said *Alice H. Dreutzer's* property."

More than thirty days elapsed after said service and before the commencement of this action. Defendant failed to remove the encroachment within such period, and refuses to do so. The prayer for relief was as follows:

"Plaintiff demands judgment that said defendant, *Alice H. Dreutzer,* forthwith remove said terrace and fence to such a point that they will no longer obstruct or encroach upon East Milwaukee avenue or any portion thereof; that the defendant, *Alice H. Dreutzer,* and all persons claiming under or through her be forever enjoined and restrained from obstructing or encroaching upon said East Milwaukee avenue; that the plaintiff recover of the defendant its costs and disbursements in its behalf sustained; that the plaintiff have such other and further relief as shall be just and equitable."

Defendant, by her attorneys, demurred to the complaint, first for insufficiency, and second for want of jurisdiction in the court of the subject of the action. The demurrer was overruled and defendant appealed.

For the appellant there was a brief by *Turner, Pease & Turner,* and oral argument by *L. S. Pease.*

Charles B. Perry, for the respondent.

MARSHALL, J. The sole question to be solved on this appeal is this: Can an action in equity be maintained by a municipal corporation to obtain a mandatory injunction compelling the removal of an encroachment upon one of its public streets without first giving the wrong-doer an opportunity to remove it without suit pursuant to an order made and served upon him in accordance with sec. 1330, Stats. 1898? It is conceded by appellant's counsel that an action in equity, by a municipality, will lie to remedy such a matter, and conceded by respondent's counsel that if, as a condition thereof, notice to the alleged guilty party must be given in accordance with the section referred to, the complaint does not state a cause of action in that the order alleged to have been served upon appellant did not sufficiently "specify the width of the road, the extent of the encroachment, and the place or places in which the same may be with reasonable certainty." The position of appellant's counsel is that such a notice was a necessary preliminary to the bringing of the suit; and that of respondent's counsel is that it was not; that such section relates exclusively to proceedings for the enforcement of the penal statutes as regards encroachments on highways.

The question upon which, as above indicated, this appeal turns, is ruled in favor of respondent by *Eau Claire v. Matzke,* 86 Wis. 291, 56 N. W. 874. The principle thereof became a part of the judicial policy of this state at least as early as *Jamestown v. Chicago, B. & N. R. Co.* 69 Wis. 648, 34 N. W. 728; *Oshkosh v. Milwaukee & L. W. R. Co.* 74 Wis. 534, 43 N. W. 489. In recent years it has been several times affirmed in effect, though not in precisely such a case as this. *Madison v. Mayers,* 97 Wis. 399, 413, 73 N. W. 43; *Pewaukee v. Savoy,* 103 Wis. 271, 280, 79 N. W. 436; *Levis v. Black River Imp. Co.* 105 Wis. 391, 395, 81 N. W. 669. True, it does not appear, by express reference in the opinion in *Eau Claire v. Matzke,* that the question of whether compliance with sec. 1330, Stats. 1898, by the municipality is a

condition precedent to the maintenance of such a suit as this, was involved; but the general terms of the opinion sufficiently indicate that the judgment of the court then was that the equitable action is maintainable entirely independent of the statutory proceeding for the discontinuance of encroachments on public highways, and that is confirmed by referring to the printed case and briefs used upon the argument. The appeal turned on the sufficiency of the complaint. That did not show service of a statutory order on the defendant to discontinue the encroachment. The circuit court held the complaint insufficient. On the appeal appellant's attorney stated that no attempt was made to comply with such section,—that the action was brought entirely without reference thereto, and insisted that the right to proceed in equity was not hampered in any way thereby. The general language of the opinion, considered with reference to the question presented to the court for decision, shows clearly that the result reached was intended to cover the precise question here presented. In harmony therewith, the conclusion is now reached that the right to institute this suit was not dependent upon a statutory order having been made and served upon appellant to discontinue the encroachment, and that the complaint states a good cause of action.

By the Court.—The order is affirmed.

MERRILL, Appellant, vs. BEST and others, Respondents.

December 1—December 16, 1902.

Contracts: Evidence: Appeal and error: Questions reviewed.

Where a written contract is ambiguous so as to justify resort to parol evidence to aid in its construction, and such evidence is in fair conflict, reversal on appeal is not justified in the absence of clear preponderance against the finding of the trial court thereon.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

In 1896 the plaintiff, together with several others, being the organizers and owners of the Britannia Mining Company, placed 25,000 shares of its stock in the hands and name of one of their number, Dupré, as trustee, to sell such stock in order to realize a fund for the development of mining properties whenever they should so decide; otherwise retaining their respective ownerships. Plaintiff's portion was 3,125 shares. He was also an owner of a large amount of other stock. On February 26, 1898, he executed to the defendant *George R. Best* an instrument in the following words:

"For the sum of $575 and other valuable consideration, the receipt of which is hereby acknowledged, I hereby sell, assign, and transfer all my right, title, and interest, consisting of about 16,000 shares of full-paid stock in the Britannia mine, to *G. R. Best,* his heirs and assigns; the said stock to be delivered on February 28, 1898. It is mutually understood that, if it falls below 15,000 shares, *Mr. Merrill* will allow a *pro rata* reduction on the shares."

On February 28th the parties met, and plaintiff indorsed and passed over to *Best* certificates for 11,231 shares of stock which were in his possession, and the parties figured up the amount to be paid under that assignment, which was paid him in money. They are in square conflict in their testimony as to whether such payment was for more than the 11,231 shares, or for that amount plus the 3,125 shares held by Dupré in trust for the plaintiff. Some time after that transaction, the defendant *Best* procured the executrix of Dupré, then deceased, to assign in blank the certificates for trust stock held by her decedent, and caused to be issued to himself certificates for the 3,125 shares contributed to that fund by the plaintiff. It was conceded that the purposes of the trust were at an end and the distribution of the stock to its owners was proper. Plaintiff commenced this suit against *Best* and the corporation and its officers to require a delivery

to him of the 3,125 shares of stock, together with any dividends or interest earned thereon. Evidence was offered for the purpose of construing the transfer of February 26, 1898, which was conflicting. The court found that the plaintiff had failed to prove the allegations of his complaint, and that the defendants had proved the allegations of their answer; that the plaintiff, on February 26th, sold and subsequently delivered to the defendant all his right, title, and interest in and to all the stock then owned by him, including his interest in the stock then held in trust by Dupré; and that the plaintiff, at the time of the commencement of the action, had no right, title, and interest in or to the stock referred to in the complaint. Accordingly judgment was entered dismissing the complaint, from which plaintiff appeals.

Chas. G. Woolcock, for the appellant.

For the respondents there was a brief by *Austin, Fehr & Gehrz,* and oral argument by *W. H. Austin.*

Dodge, J. But a single issue was litigated upon the trial of this case, namely, whether plaintiff had sold to the defendant *Best* the 3,125 shares of so-called trust stock owned by the former. The evidence on the subject consisted of the written assignment, set forth in the statement of facts, and testimony as to the situation of that stock, as to the recognition by both parties of its transfer, and payment therefor on the 28th of February, two days subsequent to the written assignment, and declarations and subsequent conduct of both *Merrill* and *Best* with reference thereto, with perhaps some irrelevant facts as to the negotiations of the parties at the time of making the written agreement. Upon this evidence the trial court found as a fact that plaintiff did transfer such stock. The instrument of February 26th, according to its tenor, undoubtedly sufficed to transfer all interest which the plaintiff had in the corporation. If it was ambiguous at all, so as to justify resort to parol evidence to aid in construing

it, the evidence given was, to say the best for plaintiff, in fair conflict; and we cannot say that the finding is so opposed to its clear preponderance as to justify reversal on appeal. Upon the facts so found, of course, judgment for the defendant was properly rendered.

By the Court.—Judgment affirmed.

EIMERMANN, Appellant, vs. NATHAN, Respondent.

December 1—December 16, 1902.

Landlord and tenant: Tenancy from year to year: Termination: Notice: Waiver.

Sec. 2187, Stats. 1898, provides that a tenancy from year to year may be terminated by a notice in writing given not less than thirty days prior to the expiration of the year. On refusal of a landlord to make repairs, a tenant from year to year stated that, if he was to remain on the premises, he would notify the landlord in two or three days. No such notice being given the landlord, more than thirty days before the expiration of the then current year, advertised the premises for rent, and posted "To Rent" notices on the premises. At the end of the year the tenant vacated, delivering the keys to the landlord. The tenant testified that when he moved he requested permission to stay two weeks longer which was refused. *Held*, that the trial court was justified in finding that the landlord had waived the giving of written notice as required by the statute, and had accepted a surrender of the premises when the tenant vacated.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

This is an action by the landlord to recover $324, as one year's rent from May 1, 1899, to April 30, 1900, less $60, which the plaintiff received on account of rental of the premises to another party during that period. The lease was executed by the plaintiff and defendant April 8, 1896, and was for the term of one year from May 1, 1896, for the rent

named, to be paid in even and equal portions on the 1st day of each month in advance,—the first payment to be made May 1, 1896,—and contained these provisions:

"Permission is hereby given lessee to renew this lease for another year at the same rent upon giving thirty days' notice in writing before the expiration hereof. Permission is given lessor to place a sign, 'To Let,' in premises, thirty days before the expiration hereof, if lease is not renewed, and permission is granted lessor during said time to show the premises to persons desiring to rent the same."

The complaint, among other things, alleges that the defendant continued to occupy the premises under the lease until April 30, 1899, and then removed therefrom without terminating such tenancy. The answer consists of admissions, denials, and counter allegations. A jury being waived, and trial had, it was found by the court at the close of the evidence, in addition to the facts stated: (3) that after the expiration of the one year designated in the lease the defendant occupied the premises as tenant from year to year, with the consent of the plaintiff; (4) that such tenancy was not terminated April 30, 1899, by either party giving to the other notice in writing, as provided in sec. 2187, Stats. 1898; (5) that more than thirty days prior to April 30, 1899, and about March 20, 1899, the defendant, through the agency of his wife, negotiated with the plaintiff concerning a renewal of the lease for another year, and, at that time, notified the plaintiff, through such agency, that if he was to remain on the premises he would let the plaintiff's wife know within two or three days, and that the defendant did not notify the plaintiff or his wife that he was to remain on the premises; (6) that thereupon the plaintiff, more than thirty days prior to April 30, 1899, advertised the premises for rent in a daily newspaper published in Milwaukee, and such advertisement was published in each issue of such newspaper to and including April 29, 1899; (7) that more than thirty days prior to April 30, 1899, the plaintiff posted a notice on or near the de-

mised premises to the effect that the same were for rent, and kept such notice so posted until after defendant had removed from said premises; (8) that the plaintiff waived the giving of the notice in writing required by sec. 2187, Stats. 1898, and accepted a surrender of the premises from the defendant April 30, 1899. And as conclusions of law the court found and decided that the defendant was entitled to judgment dismissing the complaint in this action upon the merits, and for the recovery from the plaintiff of the costs of this action, to be taxed, and ordered judgment accordingly. From the judgment entered accordingly, the plaintiff brings this appeal.

For the appellant there was a brief by *A. J. Eimermann, in persona,* and *Hoyt & Olwell,* of counsel, and oral argument by *Mr. Eimermann.*

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. H. Remington.*

CASSODAY, C. J. The findings of the court are amply supported by the evidence. The plaintiff refused to repair or make any change in the condition of the premises, as requested by the defendant, March 20, 1899, but insisted that, if the defendant continued to occupy the premises after the expiration of the year, he must take them as they were. The defendant replied that, if he remained in the premises, he would let the plaintiff know in two or three days. He did not notify the plaintiff that he would remain, and thereupon, and on March 25, 1899, the plaintiff advertised the premises for rent in a daily newspaper, and posted notice on or near the premises to the same effect. Such notices continued until the expiration of the year, with the manifest understanding on the part of the plaintiff that the defendant would then vacate the premises. Manifestly, the defendant, with the same understanding, vacated the premises April 30, 1899, and on

that day delivered the keys to the plaintiff. In addition, the defendant testified that on the morning he moved out of the premises he asked the plaintiff if he would allow him to remain for two weeks in case he failed to find another place, and that the plaintiff replied that he could not stay there any longer. The plaintiff's contention is, that notwithstanding what occurred, the tenancy, being from year to year, could, under the statute, only be terminated by either party to the lease giving to the other "a notice in writing, not less than thirty days prior to the date of such expiration, that he [elected] to terminate such lease at the end of such year." Sec. 2187, Stats. 1898. That statute was enacted to change the rule at common law, as held in *Brown v. Kayser,* 60 Wis. 1, 18 N. W. 523; *Peehl v. Bumbalek,* 99 Wis. 64, 65, 74 N. W. 545. Accordingly, and after the defendant had removed from the premises, under the circumstances stated, the plaintiff served notice on the defendant, May 2, 1890, to the effect that, he having failed to terminate the lease in the manner prescribed in that statute, the plaintiff would hold him accountable for all rent thereafter to become due under the terms of the lease, and that he should proceed to rent the premises on the defendant's account, and hold him responsible for the difference, if any, at the end of the year. A similar notice was given by the landlord after having refused to accept a surrender in a case cited by the plaintiff, and it was held that the landlord was entitled to recover the rent stipulated, less the amount received from the new tenant. *Underhill v. Collins,* 132 N. Y. 269, 30 N. E. 576. In that case the landlord refused to accept a surrender of the premises, and notified the tenant that he would hold him for the rent, but stated that he would lease the premises for the tenant's benefit; and thereupon the latter left the premises, and subsequently the landlord leased them to another. The facts in that case distinguish it broadly from the case at bar.

That case is reviewed and distinguished in a later case in the same court, where it was held:

"A surrender of leased premises is created by operation of law, although the landlord has declined an offer of surrender, where, after the tenant has abandoned them, the landlord lets them in his own name to a third person for a new term, without the tenant's consent. A tenant's assent to a new letting of premises which he has abandoned will not be implied by his failure to answer a letter from the landlord saying that he would relet them on the tenant's account, so as to prevent a surrender by operation of law if the landlord subsequently relets them." *Gray v. Kaufman D. & I. C. Co.* 162 N. Y. 388, 56 N. E. 903.

In speaking of notice to terminate such tenancy, a standard text-writer says that such notice, "like almost every other species of notice required by law for the preservation of a right or the exaction of a duty, may be waived. . . . It may be waived by either party before it is due, or after failure to give notice, by acting in conformity to the wishes of the other party, in amicably terminating the tenancy precisely as though notice had been given. It may also be substantially waived by acting upon a defective notice. And there may be a waiver of notice by the party giving it, when he subsequently acts toward the other party precisely as though no such notice had been given." Wade, Notice (2d ed.) § 641. Upon the facts stated, the trial court was justified in finding that the plaintiff waived the giving of written notice as required by the statute, and accepted a surrender of the premises from the defendant on April 30, 1899.

By the Court.—The judgment of the superior court of Milwaukee county is affirmed.

LOSSE, Appellant, vs. PEORIA CORDAGE COMPANY, Respondent.

December 2—December 16, 1902.

Contracts: Evidence: Appeal and error: Direction of verdict.

In an action for damages for breach of an alleged contract of sale of binding twine, it is not error to direct a verdict for defendant where the evidence shows that neither quantity, quality or price of the twine was ever definitely agreed upon.

APPEAL from a judgment of the superior court of Milwaukee county: OREN T. WILLIAMS, Judge. *Affirmed.*

For the appellant there was a brief by *Turner, Pease & Turner,* and oral argument by *W. J. Turner.*

For the respondent there was a brief by *John F. Burke,* attorney, and *Harrison S. Green,* of counsel, and oral argument by *Mr. Green.*

WINSLOW, J. The plaintiff is a merchant engaged in the mail-order business in Milwaukee, and brought this action against the defendant to recover damages for alleged breach of contract. The plaintiff's claim was that in December, 1897, he made an oral contract with the defendant by which defendant was to manufacture and deliver to the plaintiff during the season of 1898 a large quantity of binder twine of specified qualities, at fixed prices, and that the defendant failed and refused to carry out the contract. The defendant denied that it ever entered into the contract claimed or any contract to manufacture or deliver any specified quantity of twine. The action was tried before a jury, and at the close of the evidence the court directed a verdict for the defendant, and the plaintiff appeals.

The verdict was directed because, in the opinion of the trial judge, there was no evidence which, upon the most favorable view, would have justified the jury in finding that a con-

tract such as the plaintiff claims was ever made. Careful examination of the evidence, as contained in the bill of exceptions, convinces us that the direction was right. There was much negotiation and much talk of quantities and qualities and prices, and there was also considerable correspondence, but the utmost that can be said is that there was evidently an expectation on both sides that the plaintiff would purchase his season's twine of the defendant. Neither quantity, quality, nor price was ever definitely agreed upon. A review of the evidence would be of no value.

By the Court.—Judgment affirmed.

NORTHERN ELECTRICAL MANUFACTURING COMPANY, Respondent, vs. H. M. BENJAMIN COAL COMPANY, Appellant.

December 2—December 16, 1902.

Sales of chattels: Warranty: Notice of breach: Condition precedent: Reasonable time: Sufficiency of notice: Waiver: Prejudicial error.

1. By a contract for the sale of an electric motor the seller made certain warranties, and it was agreed if, on starting the motor, it did not comply with the warranty the purchaser should "promptly notify" the seller at his address "by telegraph or mail, stating wherein said machinery is faulty," no time limit being stated. *Held*, that compliance with such requirement was a condition precedent to the existence of any claim under the guaranty, and that such compliance must be within a reasonable time after starting the motor.
2. In such case, a delay of two and one half months in notifying the seller of defects claimed to exist, is not a reasonable time.
3. In such case notice that the machine "did not perform the work which it was required to do" does not comply with the requirement that the purchaser should notify the seller "wherein the machine was faulty."
4. The seller of a machine warranted it, providing the purchaser, on receiving and starting the machine, promptly notified the

seller, by mail or telegraph, of any defects claimed. The seller acted upon and remedied a slight defect, which developed before the machine was set up. There was evidence that communications passed between the seller and its agent about the purchaser's having trouble with the machinery subsequent to the difficulty that was remedied, but that the seller did not act on the later information. *Held*, that the seller did not thereby waive the conditions of the guaranty requiring notice.

5. Error in not directing a verdict in favor of a party is cured by a general verdict in his favor.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action to recover the purchase price of an electric motor. Defendant pleaded breach of warranty as a defense, and counterclaimed for damages suffered from such breach. It also alleged as defensive matter that the written contract was intended to have been executed in duplicate; that two papers were signed by defendant upon plaintiff's assurance that they were in fact what they purported to be; that both papers were prepared by plaintiff for execution; that after they were signed one was retained by it and the other delivered to defendant; that the latter contained these words as regards the terms of payment: "Cash when tested and found satisfactory;" that the former contained the same words when executed, but that after the transaction was closed, and without defendant's knowledge, plaintiff fraudulently changed such words to read: "Cash when tested and found according to guaranty, test to be immediately upon completion of erection."

The contract contained these provisions:

"The *N. E. M. Co.* guaranties all motors and generators of its manufacture to be of first-class workmanship and first-class standard materials and capable to perform fully up to their rated capacities upon which they are sold, and it is agreed that each machine purchased herein shall be subjected to a thorough test in said company's shops before shipment,

and that if upon receiving and starting said machinery, the purchaser claims that in any way it does not comply with the terms of this contract, he shall promptly notify the company at Madison, by telegraph or mail, stating wherein said machinery is faulty, and said company shall promptly send a representative to make an inspection and remedy the defects, if any, without charge to the purchaser, but, in case it is found the apparatus does comply with the contract and that the purchaser or his representative is at fault, then the purchaser shall pay the *N. E. M. Co.* all expenses consequent upon his mistakes.

"It is further agreed that the *N. E. M. Co.* shall make good for the period of one year from the date of shipment any part of any of said machines which may develop defects due to faulty material or shop-work, provided it is fairly shown the machinery has been properly used and operated as intended, the purchaser agreeing to notify said company at Madison, Wis., promptly according to the above agreement, if any defects are claimed."

. . . . . .

"Erected in your yards according to attached blue print. *Benjamin Coal Co.* to furnish large friction wheel and eccentric box and do all the necessary wiring.

"The *Northern Elect. Co.* guaranties this outfit to work as well as the steam hoist now in use, and to hoist a weight of 4,000 lbs. at a rate of 150 ft. a minute, or less rate at proportionately higher speed."

It was alleged in the defensive matter contained in the answer and in the counterclaim as well, that the apparatus was not capable of hoisting one third as much as could be hoisted by the steam hoist referred to in the written contract and mentioned in the guaranty; that the apparatus was never put in a condition to do practical work; that upon being tested it proved unsatisfactory; that thereafter defendant duly notified plaintiff as provided in the contract, that it was not satisfactory and would not perform the work it was guarantied to do; that plaintiff has never attempted to remedy the defects in the apparatus, and that it has never been accepted by defendant.

The evidence was to the effect, among other things, that the notice of defects given to plaintiff at Madison, Wisconsin, in compliance with the terms of the contract on that subject, was contained in the following letter:

"Milwaukee, 8/29/1900.

"Northern Electric Co.,

"Madison, Wis.

"*Gentlemen:*—We are in receipt of your telegram of this day, asking when we would send remittance. We have been endeavoring to give this motor a fair trial for some time, and during the last two or three days we have certainly given it a fair chance to show its merits or demonstrate its ability to live up to the guaranty which your company gives. So far we have been unable to get it to perform the work which it was bought to do. If you will communicate with your Mr. Whitfield, I think he will bear us out in this statement. We certainly do not want to pay for this motor unless it is going to be able to do the work which your representative guaranteed it would do. Yours truly,

"H. M. Benjamin Coal Co.,

"C. W. Moody, V. P."

After such letter was received, plaintiff sent defendant the following letter:

"September 3, 1900.

"H. M. Benjamin Coal Company,

"Milwaukee, Wisconsin.

"*Gentlemen:*—Referring to our favor of recent date in which we stated that before we could intelligently answer your last letter we would have to confer with our Milwaukee representative, would say that we have done this and are to-day in receipt of his reply, copy of which we herewith enclose, and we trust that you will favor us with check for the amount. As it is, the matter has certainly dragged along an unusual length of time, and if the machine does not fulfill the terms of the contract we would thank you to advise us immediately wherein it does not, in order that we may get the matter rectified at once. Please let us hear from you by return mail and oblige, yours truly,

"Northern Electrical Company,

"By F. L. Stagg,

"Assistant Secretary."

Such letter was not replied to. There was evidence that the apparatus did not come up to the guaranty, and no evidence that plaintiff acted upon the letter of August 29th, or upon any notice received by its agent, by endeavoring to remedy any defects that might be in the apparatus. There was evidence that defendant notified plaintiff's agent in Milwaukee that the apparatus was not satisfactory and would not be accepted, and that it would be held subject to plaintiff's order. There was, in the judgment of the court, conflicting evidence as to whether the apparatus was accepted by defendant. Therefore a motion on the part of plaintiff for the direction of a verdict was denied, due exception being taken to the ruling. The jury rendered a verdict in plaintiff's favor for the amount claimed in the complaint. Judgment was rendered accordingly, all questions being reserved for review upon appeal by the defendant, presented for consideration and discussed in the opinion.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. H. Remington.*

For the respondent there was a brief by *Spooner & Ellis,* and oral argument by *Willet M. Spooner.*

MARSHALL, J. As we view the record in this case it was the duty of appellant, promptly after the machine was started up and put into the service for which it was purchased,—which seems, unquestionably, to have occurred June 17, 1900,—to decide whether such machine fulfilled the contract, and, if the conclusion was unfavorable, to notify respondent thereof at Madison, Wisconsin, by telegraph or mail. That is what was agreed upon in these words:

"If upon receiving and starting said machinery, the purchaser claims that in any way it does not comply with the terms of this contract, he shall promptly notify the company at Madison by telegraph or mail, stating wherein said machinery is faulty."

Compliance with that requirement was a condition precedent to the existence of any claim under the guaranty. Notwithstanding the duty of appellant as indicated, twenty-two days after the machine was started, it wrote respondent, promising payment in a short time, and making no complaint whatever but that the machinery was satisfactory. It wrote again a few days thereafter, making an excuse for nonpayment of the purchase money, but finding no fault with the machinery. It wrote again nearly a month thereafter, and more than two and one-half months after the machine was put into service as aforesaid, in which, though complaint was made that it did not come up to the calls of the contract, no attempt was made to state wherein it failed to do so. It is not claimed that there was any attempt to comply with the conditions of the warranty in respect to notice of defects except by the letter of August 29, 1900. That such letter was not a reasonable compliance with such condition seems too plain to require any discussion whatever. It contained no specification of defects. Therefore the condition upon which the machinery was warranted was never satisfied. If we were to hold that the letter of August 29th was a sufficient compliance with such condition as to mere matter of form, it would not avail appellant, as the time for it to notify respondent that the machinery was not according to the contract, stating wherein it was not, expired as a matter of law as soon as it had a reasonable time after June 17, 1900, to communicate with respondent at Madison, Wisconsin, in the manner agreed upon. Certainly, two and one-half months was too long for that purpose. If authorities were needed to support the views here expressed, *Nichols & S. Co. v. Chase,* 103 Wis. 570, 79 N. W. 772, and *Trapp v. New Birdsall Co.* 109 Wis. 543, 85 N. W. 478, would be ample for that purpose. It follows that, construing the warranty contained in the contract, with the condition precedent to appellant's right to any benefit thereunder, no actionable breach of contract is dis-

covered, but on the contrary an acceptance of the machinery as satisfying the contract is established.

Some claim was made on the oral argument that respondent, by its conduct, waived the condition of the contract as to notice, above discussed. We are unable to discover anything in the record to warrant that view. There was evidence that respondent acted upon information respecting a slight defect in the machinery, which developed before it was put into the service for which it was purchased, and that the defect was remedied. There is also evidence of some communication having passed between respondent and its agent about appellant's having trouble with the machinery subsequent to the difficulty that was remedied. But there is no evidence that respondent received any information from its agent in that regard which was acted upon, other than in the instance mentioned. Mere information of defects in the machinery, communicated to respondent in a manner different from that stipulated in the contract, not acted upon, in lieu of the notice agreed upon, did not operate to waive the condition of the guaranty. *Davis v. Butrick,* 68 Iowa, 94, 26 N. W. 27; *Massachusetts L. & T. Co. v. Welch,* 47 Minn. 183, 49 N. W. 740.

The result of the foregoing is that the court erred in appellant's favor in not directing a verdict for respondent. That was cured by the verdict which the jury rendered. The judgment is right regardless of whether the errors assigned by appellant would in any event require a reversal thereof. Therefore it is unnecessary to discuss such errors or even give place to the statement of them in this opinion.

By the Court.—The judgment is affirmed.

BURKE, Respondent, vs. THE SIDRA BAY COMPANY, Appellant.

SAME, Appellant, vs. SAME, Respondent.

December 2—December 16, 1902.

Corporations: Implied contracts: What may constitute corporate action: Loan by stockholder to corporation, when due: Interest.

1. Where moneys are advanced for the use of a corporation with the knowledge, and upon the request of all the stockholders and officers acting in consultation as to the policy and conduct of the corporate affairs, such request is tantamount to that of the corporation, and therefrom, in the absence of any countervailing express stipulations, results an implied contract of the corporation to repay those advances, although there was no formal notice for, or record of, a meeting of the corporation.
2. In carrying on the business of a corporation owning no assets but real estate, it was mutually understood by the stockholders and directors thereof, among whom was plaintiff's assignor, that they would not presently demand repayment of advances made for its use, so long as they should all agree on continuing the attempt to carry on its business. No definite term for such forbearance was agreed upon, and subsequently the conduct of the business for which the advances were made was abandoned. *Held*, that the lending stockholder might, after a reasonable time, terminate the indefinite term of credit and render the debt absolutely due.
3. In such case five years is a reasonable time, and the election is sufficiently declared by commencing action therefor.
4. Where the time of payment of a debt is indefinite, and the creditor has not exercised the right to declare the term of credit at an end, except by bringing action on the debt, interest can only be recovered from the date of the commencement of the action.

APPEALS from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Two gentlemen, by the name of Ewing and Mitchell, having discovered what they believed to be a deposit of infusorial earth in Eau Claire county, from which could be obtained a product valuable in certain manufactures, secured control or

ownership of certain lands, and proceeded to make explorations. After a little, one James Douglas was invited to join them in such enterprise, and to be permitted to do so upon equality with the other two upon payment of $500, to be expended in such explorations and development. He accepted, paid his $500, and thereafter certain further explorations were made and at least one additional piece of land purchased, upon a small cash payment. Thereafter they organized the defendant corporation, each of them taking one third of the $150,000 of the capital stock, and transferring to it the real estate rights which they had obtained. Douglas was elected president and treasurer, Ewing secretary, and all three directors. The company had no money, of course, as its entire capital stock had been issued for the real estate rights. Prior to the incorporation the parties had an understanding that they would advance moneys as they were able for the purposes of experiment and exploratory work. After the corporation was organized, they, all being directors and meeting together, reached a loose and general understanding that they would make advances to the corporation for some experimental reduction of the product to a commercial form, and for such other purposes as the corporation might need; the same to be paid back to each when the corporation had money to pay it. They appear not to have been equally able to advance, and the agreement seems to have been a very loose one, made in expectation of a speedy reduction of product to commercial form and sale thereof in the way of a manufacturing business. They do not seem to have expressed, if they considered, the contingency of failure of such experiments, abandonment of the business, and the sale of the real estate which the company owned. Advances were apparently made by both Ewing and Mitchell, the amounts whereof are not in evidence, but Douglas expended sums amounting to $1,411.94; the earliest large items of such advances being $100 and $475, necessarily advanced to

protect and complete the corporation's title to a certain parcel of land purchased before incorporation from one Backstrom. At about this time $200 was paid back to Douglas by his two fellow directors. The other disbursements are of various character,—recording deeds, expenses of himself and others to Eau Claire, and work in getting out a few car loads of the earth and shipping the same to Milwaukee, where was attempted to be erected a reduction plant, to the expenses of which doubtless the others contributed considerable sums. These experiments and expenditures extended from May, 1894, when the corporation was organized, up to an indefinite date prior to March, 1896, when the reducing plant in Milwaukee was burned down. Shortly thereafter both Ewing and Mitchell sold their stock in the corporation to one Whigham for a price not stated, and accompanied the sale by an assignment to him of their respective claims against the corporation for moneys advanced in pursuance of this understanding. Douglas, about the same time, sold his stock to one Rice, but did not assign to him his claims against the corporation for money advanced. He resigned his position as director, president, and treasurer in March, 1896. Thereafter all of the stock became assigned to one Springer, who now holds the whole, except four shares, placed in the names of others in order to qualify them as directors and officers. All attempts to do any business whatever have been abandoned since the spring of 1896. On January 31, 1901, the plaintiff, to whom Douglas had assigned his said claim for advances, commenced this suit against the corporation to recover the same. The action was tried to the court, which made findings to the effect that the money was in fact loaned to the corporation, and expended for its purposes by Douglas while treasurer, with the knowledge and consent and at the request of all the other then stockholders, officers, and directors, and that all material allegations contained in the complaint are proven and true. It accordingly rendered judgment in favor

of the plaintiff for the amount of such advances, less the $200 paid him by his fellow stockholders; to wit, $1,211.94, with interest from the commencement of the action. From the whole of this judgment the defendant appeals, and the plaintiff appeals from that portion of it which denies him interest on the several advancements from their dates up to the commencement of the action.

For the plaintiff there were briefs by *John F. Burke,* attorney, and *Harrison S. Green,* of counsel, and oral argument by *Mr. Green.*

S. A. Connell, for the defendant.

DODGE, J. The trial court found that all of the moneys claimed were advanced by Douglas for the use and benefit of the corporation with the knowledge, approval, and consent, and upon request, of all the stockholders, officers, and directors. Such consent and request of the directors is tantamount to that of the corporation, when, as appears from the evidence, they were all together in consultation as to the policy and conduct of the corporate affairs, and when a decision so reached by them has been acted on to the detriment of the actor. Formal notice or record of any such meeting is not essential. *Northwestern Fuel Co. v. Lee,* 102 Wis. 426, 78 N. W. 584; *Heinze v. South Green Bay L. & D. Co.* 109 Wis. 99, 105, 85 N. W. 145; *Goodvin v. Nichols,* 109 Wis. 672, 85 N. W. 501; *St. Clair v. Rutledge,* 115 Wis. 583, 92 N. W. 234; *Lowe v. Ring,* 115 Wis. 575, 92 N. W. 238. This finding is fully supported by the evidence; indeed, is substantially confirmed by all the witnesses, except as they labor under some mental confusion as to the difference between the corporation and themselves. From these facts resulted, upon most elementary principles, an implied contract of the corporation to repay these advances, upon which the liability was immediately enforceable in the absence of any countervailing express stipulations. That stipulations were made to the effect that such

moneys should not be payable until profits sufficient had been realized is strenuously contended by respondent, and was most vigorously litigated upon the trial. Upon that contention there is no specific finding by the trial court, unless he intended as such the declaration that all the material allegations of the complaint are true. Such a generalized and ambiguous statement does not merit approval, as more fully pointed out in *Milwaukee Nat. Bank v. Gallun, ante,* p. 74, 92 N. W. 567. By reason of this condition of the findings, we have found it necessary to go at large into the evidence, to ascertain whether or not it supports the judgment. Analytical discussion thereof certainly need not be included in this opinion. Suffice it to say that we find that it was mutually understood by the directors, including plaintiff's assignor, Douglas, that they would not presently demand repayment of their advancements, at least so long as they should all agree on continuing the attempt to do business, rendering such advances necessary to the otherwise empty corporate treasury. There was no definite term for such forbearance agreed upon, and, as it was accorded merely to render possible the conduct of certain business, it was conditioned upon such necessity, which terminated when the policy of attempting such business was definitely abandoned. Doubtless this forbearance might be held to extend over a reasonable interval of suspension, and the extent of such suspension might be protracted by consent or acquiescence of the creditor, so that some exercise of election on his part might be necessary to absolutely terminate the indefinite term of credit and render the debt absolutely due. Such we find to have been the substance and effect of the understanding, as disclosed by the evidence. It also appears that all attempts to do business ceased as early as March, 1896. Certainly, the creditor had in January, 1901, waited a reasonable time, and might then elect that his debt should be due, which election he sufficiently declared by commencing suit. We therefore conclude that plaintiff's right to

recovery of the principal of his debt and interest from the commencement of the action is fully supported by the record, and that the judgment should not be reversed on defendant's appeal.

Plaintiff, on his appeal, complains of disallowance of interest from the time of making the advances to commencement of the action. The general rule on this subject is well settled. Defendant is liable for interest from the time when it became its legal duty to pay the debt. *Laycock v. Parker,* 103 Wis. 161, 79 N. W. 327; *Smith v. Putnam,* 107 Wis. 155, 168, 82 N. W. 1077, 83 N. W. 288. That time was indefinite. It became fixed only when the creditor exercised his election to declare the term of credit at an end. Of any such declaration there is no evidence until made by commencing suit; hence the judgment allowing interest from that date only is correct.

By the Court.—Judgment affirmed on both appeals.

THE STATE EX REL. THE VILTER MANUFACTURING COMPANY and others, Respondents, vs. THE MILWAUKEE, BURLINGTON & LAKE GENEVA RAILROAD COMPANY, Appellant.

December 3—December 16, 1902.

Street railways: Commercial railroads: Franchise to occupy city streets: Ordinances: Construction: Quo warranto: *"Person," in statute: "Franchise," in statute: "Holding and exercising a franchise," in statute.*

1. A city ordinance granted to a commercial railroad, organized under sec. 1820, Stats. 1898, "its successors and assigns," the right to construct an elevated railroad over certain streets, many of which contained surface street railways. The ordinance was denominated a franchise; contemplated the erection of passenger stations, etc.; limited the rate of fare within

the city; required the carriage of policemen, firemen and health officers free, and required the company to build and maintain certain bridges for the accommodation of teams and foot passengers as well as its trains. *Held*, that the ordinance attempted to, and did, grant a franchise to operate an elevated street railway, under sec. 1862, Stats. 1898 (providing for the formation and powers of street railways, and regulating granting franchises therefor), and that it was not a mere code of police regulations, regulating the use of the right conferred on commercial railroads by sec. 1828, Stats. 1898, to build and maintain their road across or along any street.

2. An ordinary commercial railroad organized under sec. 1820, Stats. 1898 (providing for the organization of corporations for constructing, maintaining and operating railroads for public use in the conveyance of persons or property), is not endowed with the power to accept street railway franchises under said sec. 1862, Stats. 1898.

3. A private corporation is a "person" within the meaning of sec. 3466, Stats. 1898, providing that an action may be brought by the attorney general in the name of the state "when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within the state."

4. A street railway franchise to operate a system of street railways in a city, using the streets and alleys for that purpose, is a "franchise" within the meaning of said sec. 3466. The state may by *quo warranto* inquire into the title by which it is held, and, if the party assuming to exercise it has no title thereto, judgment of ouster will be rendered.

5. Under said sec. 3466, Stats. 1898, a commercial railroad, by a formal acceptance under seal, as the ordinance required, accepted a franchise to construct and maintain a street railway over certain streets in the city of Milwaukee. *Held*, that it was holding and exercising the franchise, attempted to be granted, within the meaning of sec. 3466, Stats. 1898, as fully as if it had started to build its structure.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

This is an action of *quo warranto*, brought in the name of the state by four owners of real property in Milwaukee for the purpose of testing the right of the defendant to hold and exercise a certain alleged franchise granted to it by the common council of the city of Milwaukee. The complaint

charged: (1) That the defendant is a railroad corporation organized under sec. 1820, Stats. 1898; (2) that the relators severally own certain pieces of real estate in said city abutting on the streets named in the franchise attacked, and that the construction of an elevated railroad along said streets would greatly damage the said property; (3) that, upon the defendant's application, on the 26th day of August, 1900, the common council of Milwaukee passed a certain ordinance purporting to grant the right to build an elevated railroad upon certain streets in the city of Milwaukee (a copy of such ordinance being attached), and that the mayor vetoed such ordinance, and that the same was afterwards passed over the veto by said common council September 9, 1901; (4) that the defendant thereafter filed with the city clerk its acceptance of said ordinance, in writing and under seal, and that it holds said franchise so attempted to be granted, and exercises the same by proceeding to act thereunder, and by said written acceptance, and by maintaining its alleged rights to said streets, although no work has been done or money expended; (5) that the defendant has no power or authority under the law to construct the railroad named in said franchise, or to accept or hold such franchise, and that the city has no power to grant the same to the defendant; (6) that an application to bring an action of *quo warranto* against the defendant has been made to the attorney general, and that he has refused to bring such action, and that the relators have given bond to the state for costs in this action, which has been approved by the attorney general. The prayer is that the defendant show cause by what authority it holds and exercises the said franchise, and, in default of showing cause, that it be adjudged guilty of unlawfully holding and exercising the same, and that it be excluded therefrom.

The ordinance aforesaid, a copy of which is attached to the complaint, is entitled "An ordinance granting a right of way to the *Milwaukee, Burlington and Lake Geneva Railroad*

Company," and it provides, in substance, as follows: (1) That there is given and granted to the *Milwaukee, Burlington & Lake Geneva Railroad Company,* its successors or assigns, the right, permission, and authority to construct, maintain, and operate an elevated railroad with two or more tracks, not exceeding four, as said company, its successors or assigns, may from time to time deem necessary, and such curves, spurs, sidetracks, switches, sidings, turnouts, connections, girders and supports, stations, platforms, and stairways, and such telegraphs, telephones, signals, and other devices as the company, its successors or assigns, may deem necessary upon the routes thereinafter named; the route authorized being a route commencing on Milwaukee street, at the south line of Michigan street, and from thence running south along and over the streets specifically named to the southern limits of the city. (2) That the authority and privileges granted are upon condition that the railroad shall be an elevated structure, with girders and uprights of iron or steel, built in the most approved manner, and of the best material, and under certain restrictions specifically set forth in the ordinance. (3) That the company, its successors or assigns, shall have authority to construct at such points as it elects, most convenient to the people, all necessary or proper stations, stairs, and depots, and connect the same with streets, avenues, and alleys by means of stairs, stairways, elevators, and landing places; full provisions being made requiring the proper construction, heating, and lighting of such depots and stairways. (4) That before any part of the structure or any station shall be commenced the plan thereof shall be submitted to the board of public works, and approved by them. (5) That the city shall at all times have the right to change the grade of any street, and that the company shall thereupon change its structure to conform therewith in case the grade be changed more than twelve inches. (6) That the company be permitted to

cross the Milwaukee river and the Kinnickinnic river in certain places provided, and the company agrees to construct new bridges at such places after approved patterns, which shall also accommodate teams and foot passengers. (7) That the motive power of the road shall be electricity or some other improved mechanical power adapted to rapid transit, other than steam. (8) That the city shall have the right to use the structure for placing thereunder police, fire alarm, and telephone wires. (9) That in consideration of the privileges granted the company, its successors or assigns, shall carry upon all of its cars operated within the city limits all members of the police, fire, and health departments, when in uniform, without charge. (10) That the rate of fare between two points within the city shall not exceed five cents for one person over five years of age, and that children under that age shall be carried free when in charge of persons paying fare. (11) That the privileges granted are upon the express condition that the railroad shall be completed within three years from the acceptance of the ordinance, and upon the further condition (12) that the company, its successors or assigns, shall protect the city against all suits and damages of every kind resulting from the passage of the ordinance or the construction of the road. (13) That the company shall give a good and sufficient bond in the sum of $100,000, conditioned to perform all of the provisions of the ordinance, and to indemnify the city as aforesaid. (14) That if the company, its successors or assigns, shall not file with the city clerk a formal acceptance of the ordinance within ninety days after the passage and publication thereof, the rights and privileges granted shall be null and void.

The answer of the defendant admitted its corporate character as alleged; also that the relators owned property abutting upon the route of said railroad as alleged; but denied that such property is or will be damaged by the construction of the railroad, and that, if any damage does result, the

relators have an adequate remedy in law. The answer further admits that the defendant prayed for the passage of the ordinance; that the same was passed; that the defendant accepted the same, and holds it; and that it is the defendant's *bona fide* intention to build a road to the city of Lake Geneva. The answer further alleges that after said ordinance was passed the defendant expended large sums of money in surveying its line in the city of Milwaukee and through the country of the state, and in making plans for bridges, amounting in all to $50,000; that outside of the city of Milwaukee said road is to be a surface railroad, but that, in order to reach its terminus in the city, it will be necessary to come into the city by an elevated road on account of the many street railroads and other railroad tracks upon the surface. To this answer the relators demurred generally. The demurrer was sustained, and the defendant appeals.

For the appellant there were briefs by *O'Connor, Schmitz & Wild,* attorneys, and *Burr W. Jones,* of counsel, and oral argument by *Mr. J. L. O'Connor* and *Mr. Jones.* They contended, *inter alia,* that a railroad company organized under sec. 1820, Stats. 1898, has authority to accept an ordinance authorizing such railroad company to build its structure, and operate its cars thereon in the city of Milwaukee, as contemplated. *Halsey v. Rapid Transit St. R. R. Co.* 47 N. J. Eq. 380, 20 Atl. Rep. 859, 862; *State v. Hancock,* 35 N. J. Law, 537, 545; 4 Thompson, Corp. § 5641; *Ellerman v. Chicago J. R. & U. S. Y. Co.* 49 N. J. Eq. 217, 23 Atl. Rep. 287, 295, 296; *Clark v. Farrington,* 11 Wis. 321; *Madison, W. & M. P. R. Co. v. W. & P. P. R. Co.* 5 Wis. 173; *Winterfield v. Cream City B. Co.* 96 Wis. 239, 243; *Bishop v. North,* 11 Mees. & W. 418; 1 Elliott, Railroads, § 7; *Lieberman v. Chicago & S. S. R. T. R. Co.* 141 Ill. 140, 30 N. E. Rep. 544, 547; *Fulton v. Short Route R. T. Co.* 85 Ky. 640–647. The ordinance is not a franchise, but a license, which the city of Milwaukee had power to grant. Sec. 1820, Stats. 1898;

Jamestown v. C., B. & N. Ry. Co. 69 Wis. 648; *Evans v. C., St. P., M. & O. Ry. Co.* 86 Wis. 597, 604; *Oshkosh v. M. & L. W. R. Co.* 74 Wis. 534, 536; *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23; sec. 3, subch. IV, ch. 184, Laws of 1874; *Bell v. Platteville,* 71 Wis. 139; 1 Dill. Mun. Corp. 89, 575; *Detroit C. St. R. Co. v. Detroit,* 64 Fed. Rep. 628, 636; *Atchison St. R. Co. v. M. P. R. Co.* 31 Kan. 661. The ordinance was a proper exercise of the police power. *State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23, 36; *Thorpe v. R. & B. R. Co.* 27 Vt. 140. *Quo warranto* is not the proper remedy. *People ex rel. Maybury v. Mutual G. L. Co.* 38 Mich. 154; *Metropolitan C. R. Co. v. C. W. D. R. Co.* 87 Ill. 318; *Swarth v. People ex rel. Paxton,* 109 Ill. 621; *People ex rel. Macey v. Hillsdale & C. T. Co.* 2 Johns. 190; *State ex rel. O'Brien v. Kill Buck T. Co.* 38 Ind. 71; *Att'y Gen. v. Metropolitan R. R. Co.* 125 Mass. 515; *People ex rel. Byers v. Grand River B. Co.* 13 Colo. 11, 21 Pac. Rep. 898; *People ex rel. Farrington v. Whitcomb,* 55 Ill. 172; *Schultz v. State ex rel. Steele,* 65 Ind. 493; *State ex rel. Walker v. Green,* 112 Ind. 462; *People v. Equity G. L. Co.* 141 N. Y. 232.

For the respondents there was a brief by *McCabe & Dahlman* and *Timlin, Glicksman & Conway,* and oral argument by *W. H. Timlin* and *L. A. Dahlman.*

WINSLOW, J. By this action of *quo warranto* the relators have challenged the right of the defendant corporation to hold and exercise the privileges attempted to be conferred upon it by the common council of Milwaukee by the ordinance of which an abstract appears in the statement of facts. The relator's claim, in brief, is this: The defendant is a commercial railroad corporation organized under sec. 1820, Stats. 1898, and is not authorized by law to operate a street railroad. The ordinance in question is in fact a street railway franchise, and can only be legally granted to a street railway

corporation organized under sec. 1862, Stats. 1898. The defendant by accepting such franchise by formal written acceptance, and by insisting upon its right to hold and use the privileges granted by the ordinance, is unlawfully "holding" and "exercising" a franchise within the state, within the meaning of subd. 1, sec. 3466, Stats. 1898. On the other hand, the defendant claims that, while the ordinance in question has been termed a "franchise," and is framed in language appropriate for a franchise, it is in reality simply a code of regulations made by the city in the exercise of its police powers; not conferring any rights or privileges upon the defendant, but merely regulating the use of its right to build a railroad across or along any street, which right it obtains directly from the state by the provisions of subd. 5, sec. 1828, Stats. 1898.

The questions upon which the decision of the case depend may be stated as follows: (1) Is the ordinance in question an ordinance granting street railway franchises? (2) If so, can the defendant hold or exercise such franchises? (3) If not, can the relators invoke *quo warranto* as a remedy?

1. As to the first question: The various provisions of the ordinance leave us no room to doubt that it is, in effect, an ordinance attempting to grant a franchise to operate an elevated street railroad in the city of Milwaukee. The fact that it is called a franchise, and that it is couched in terms frequently used in granting franchises, is not, of course, conclusive as to its character. Such terms might be used, and yet, if the provisions themselves were simply police regulations, they would not become franchises because they were so called. But, looking over the whole ordinance, it seems to us very clear that the term "franchise" was used advisedly. It bears nearly or quite all the marks usually borne by street railway franchise ordinances. The rights are granted to the defendant, its successors or assigns. It contemplates that almost the entire road within the city limits shall be con-

structed over and along streets, many of which are much-used business streets, and some containing surface street railways. It also contemplates the construction of stations, stairways, and platforms in the streets for the accommodation of passengers. The provisions as to these stations, stairways, and platforms are elaborate, and seem to be framed with the idea that there will be numerous stations; and this is further made clear by the provision limiting the rate of fare between *two points* within the city of Milwaukee to five cents, and the provision that policemen, firemen, and members of the health department shall be carried free of charge within the city limits. Unless the supposed railway was expected to be to all practical intents and purposes a street railway with numerous stations, these clauses limiting fares within the city limits, and providing free carriage for city employees, would be absolutely nonsensical. Again, the ordinance provides that in return for the rights granted by the ordinance the company shall build bridges, which shall accommodate teams and foot passengers as well as its railroad, and perpetually furnish the power necessary for opening and closing the same. Here the city definitely proposes to exact from the company in return for its privileges an expensive service to be rendered to the city and its citizens. Whether these exactions could be legally made in the proper exercise of the police power it is not necessary to decide (*State ex rel. Wis. Tel. Co. v. Sheboygan,* 111 Wis. 23, 86 N. W. 657), but, in any event, they tend very strongly to stamp the ordinance as an attempted franchise. We can come to no conclusion except that the ordinance is, and was intended to be, a grant of the right to build a street railway over streets and bridges in the city of Milwaukee, under the provisions of sec. 1862, Stats. 1898.

2. The second question can be answered with little hesitation. It is very clear that the legislature did not intend that ordinary commercial railroads organized under sec. 1820, Stats. 1898, should be endowed with the power of accepting

street railway franchises under sec. 1862. The intention to keep the two classes of companies separate and distinct could scarcely be more clearly expressed than it has been by the statute. Street railway franchises can only be granted to street railway corporations formed under chapter 86, Stats. 1898, for the purpose of building and operating street railways. This is so plain, under the provisions of sec. 1862, *supra,* that we will spend no further time upon the question. Indeed, this proposition was not disputed by appellant's counsel.

3. We thus come to the question whether the relators have chosen the proper remedy. Our statute provides (sec. 3466, Stats. 1898) that an action may be brought by the attorney general in the name of the state "when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or *any franchise* within the state," and that such action may be brought by a private person on his own complaint when the attorney general refuses to act. It is alleged in the complaint in the present case that the attorney general, on due application to him, has refused to act, and this is expressly admitted in the answer; hence it is clear that, if it appear by the answer that the defendant is a person usurping or unlawfully "holding or exercising a franchise within this state," no defense to the action is shown. It was held in *State ex rel. Att'y Gen. v. Portage City W. Co.* 107 Wis. 441, 83 N. W. 697, that a private corporation is a "person," within the meaning of this statute, and that a franchise to operate a system of public waterworks in a city, using the streets and alleys for that purpose, while not a corporate franchise in the sense that it is necessary to corporate existence, is still a franchise within the meaning of the section quoted, and may be annulled for cause by *quo warranto* proceedings. A street railway franchise is of the same nature as the franchise considered in the case just cited. While not a corporate franchise, it is a special privilege

granted by sovereign authority, and the state may always inquire into the title by which it is held, and render judgment of ouster if the party assuming to exercise it has no title thereto. High, Extr. Rem. (3d ed.) § 648. It is well understood that there must be something more than a mere *claim* of the franchise or privilege in order to justify an action of *quo warranto*. There must be a usurpation or an unlawful holding or exercising of the franchise, as the statute indicates. Indeed, the very form of the ancient writ demonstrates this. It commanded the defendant to show by what right *(quo warranto)* he exercised the franchise, having no lawful grant thereof. The principle is well illustrated in *Att'y Gen. v. S. & St. C. R. Co.* 93 Wis. 604, 67 N. W. 1138, where it was said, quoting from *People v. Thompson,* 16 Wend. 657:

"There must be a *user* or *possession* of the office or franchise to authorize the information, and a mere claim is insufficient."

That was a case where the legislature had passed an act amending the charter of a railroad corporation and granting it additional privileges. The claim on the part of the attorney general was that the corporation, by long nonuser, had surrendered its charter, and ceased to exist, and hence could not exercise the rights attempted to be granted to it by the amending act. There was no allegation in the proposed information that the corporation had accepted the provisions of the amending act, nor that it had used or attempted to use the rights and privileges in terms conferred by the amending act; and it was held that the vague and uncertain allegation in an unverified statement by way of showing cause (signed only by the attorneys of the company, and in no sense an answer to the information) that it "is exercising and intends to exercise the rights, privileges, and franchises conferred" by the act, did not aid the information, and hence the motion for leave to file the information and bring the action was denied, because it was not shown that there was anything more

than a mere claim on the part of the defendant. In the present case, however, the situation is essentially different. The ordinance required the defendant to accept it in writing within a specified time, and the defendant within that time filed a formal written acceptance thereof with the city clerk. Had the defendant been a street railway corporation, and able to accept such a grant, it is well settled that by such acceptance it would have assumed a public trust. It would have thereby become its duty to serve the public by building and operating its road; not simply because of the contract it had made, but because of the public duty involved by the acceptance of a legislative grant. It might be compelled to carry out that duty, or action could be brought by the state to forfeit its franchises and vacate its charter for failure to perform it. *Wright v. Mil. E. R. & L. Co.* 95 Wis. 29, 69 N. W. 791. In *Stedman v. Berlin,* 97 Wis. 505, 73 N. W. 57, where a franchise of a public waterworks company was in question, and no work had been done, and there was no holding or possession of the franchise save that resulting from an acceptance thereof, and the filing of a bond to perform its terms, it was held that in that case the remedy was not by action in equity at the suit of a private party, but by *quo warranto* or *scire facias* at the suit of the state, because the party was in the exercise of the privileges conferred. The simple principle is that the defendant in *quo warranto* must be unlawfully holding or exercising the franchise, or else the action will not lie. In the case of *Att'y Gen. v. S. & St. C. R. Co.* 93 Wis. 604, 67 N. W. 1138, there was no holding or exercising of the franchises attacked. The company had not formally accepted the act in writing, nor had it accepted it by acting under any of its provisions. The most that could be said was that it had made a mere claim. But in the present case the defendant had accepted the franchise granted by a formal acceptance under seal, as the ordinance required. It has thus not only made a contract with the public to carry

out its provisions, but has become charged with a duty so to do (providing it had legal power to accept such a franchise). Under these circumstances we can see no escape from the legal conclusion that it is holding and exercising the franchise as fully as if it had started to build its structure, and removed a few wagon loads of earth, or planted a few foundation stones. It may be remarked in the present case that the answer alleges that the company has already spent large sums in surveying the route in the city of Milwaukee, and in procuring plans for its bridges, so that it appears by the answer itself that there has been an actual acceptance of the ordinance by commencing work under it. However, we prefer to base our conclusions upon the formal written acceptance.

This opinion has perhaps been carried to greater length than necessary. The trial judge decided the case in a brief opinion, which very pithily disposes of most of the material questions involved, and which we cannot forbear quoting in full, as follows:

"The defendant is a commercial railroad, not a corporation formed for street railway purposes. The authority of the city of Milwaukee in the premises is confined to such reasonable police regulations as may be proper. The ordinance in question is, by its express terms, a franchise. Authority for such grant from the city is found only in sec. 1862, Stats. 1898, and extends merely to street railway corporations. The franchise granted by the common council is therefore without warrant in law. The action is properly brought, and it is the determination of the court that the defendant holds such franchise unlawfully."

By the Court.—Order affirmed.

CASES DETERMINED

AT THE

January Term, 1903.

BOYD, Receiver, and others, Appellants, vs. MUTUAL FIRE ASSOCIATION OF EAU CLAIRE and others, Respondents.

116	155
s116	177
116	326
116	155
117	s440
117	s444

November 6, 1901—June 19, 1902.
October 24, 1902—January 13, 1903.

Corporations: Insolvency: Receivers: Winding-up suit: Mutual fire insurance corporations: Policy holders: Parties: Limitation of actions: Officers and directors of corporations: "Trustees of an express trust": Misfeasance: Malfeasance: Cause of action: Action at law or in equity: Pleadings: Amendment: New cause of action: Demurrer: Joinder of causes of action.

1. In an action to wind up the affairs of an insolvent corporation, the amended complaint alleged that certain pretended creditors, who were also its stockholders and directors, for the purpose of saving themselves harmless from liability, brought a friendly action to have the corporation adjudged insolvent, for winding up its affairs, and had a receiver appointed therein; that subsequently such receiver was removed and another appointed in his place, who, with certain other creditors, reorganized the action and made the original plaintiffs and the first receiver parties defendant. The amended complaint alleged collusion between the original plaintiffs and the first receiver, and demanded judgment for both specific and general relief against all the defendants. *Held*, that the action was a creditor's suit brought in equity, under secs. 3216–3228, Stats. 1898, providing for the winding up the affairs of insolvent corporations.
2. In an action to wind up the affairs of an insolvent mutual fire insurance association, a member thereof must be regarded in a similar position to a stockholder of an insolvent corporation, and, the association having been adjudged insolvent and a receiver appointed pursuant to secs. 3216–3228, Stats. 1898, the

right to enforce any liability against such member thereupon accrues.

3. An action to wind up the affairs of a mutual fire insurance company was commenced November 15, 1890, the corporation then adjudged insolvent, and a receiver appointed. On May 8, 1900, the action was reorganized and certain policy holders, not theretofore parties, were made defendants. *Held*, that the statute of limitations began to run in favor of such policy holders November 15, 1890, and, until they were so made parties, and the summons issued against them, the statute did not stop running in their favor.

4. Where insolvency of a mutual fire insurance company occurs during the life of a member's insurance therein, the action of the court under secs. 3216–3228, Stats. 1898, in adjudging such insolvency, granting an injunction and appointing a receiver, operates to cancel his policy in such company, and the statute of limitations begins to run from that date.

5. Subd. 5, sec. 2081, Stats. 1898, provides that express trusts may be created for the beneficial interests of any person when such trust is fully expressed and clearly defined upon the face of the instrument creating it. *Held*, that the officers and directors of a corporation are not trustees of an express trust within the calls of said statute, although a trust is necessarily "fully expressed and clearly defined" in the articles of incorporation.

6. So long as a corporation is a going concern neither it, nor its governing body, holds the corporate property in trust for its creditors.

7. The officers and directors of a corporation occupy a fiduciary relation, demanding care, vigilance, and good faith, and, if they are guilty of misfeasance or malfeasance, the corporation may at once bring an action at law to enforce any such violations of duty.

8. In such case, if the corporation refuses to act, its stockholders before insolvency, and its creditors after insolvency, may enforce such liability in the right of the corporation, and the fact that the creditor must sue in equity does not alter the running of the statute of limitations, since the application of the statute of limitations in equity is determined by the cause of action stated, rather than by the nature of the relief demanded.

9. A cause of action for misfeasance or malfeasance against officers or directors of a corporation is one in the right of the corporation, and, when brought by creditors after the insolvency of the corporation, is subject to such objections as the recalcitrant officers might have urged had the corporation brought the suit, including the plea of the statute of limitations; sec. 4206, Stats. 1898 (providing that civil actions can only be com-

menced within the periods prescribed by statute), being general and comprehensive, and in itself making no exceptions as against trustees of any kind.

10. Certain alleged creditors of a corporation, some of whom were officers and directors therein, brought an action to have it adjudged insolvent, for a winding up of its affairs, and procured the appointment of a receiver of the corporation therein. Subsequently such receiver was removed, and another appointed, who, with certain other creditors, reorganized the action and made the first receiver and said plaintiffs defendants. The amended complaint alleged collusion between the original plaintiffs and many acts of misfeasance and malfeasance on the part of such officers and directors. The action was reorganized more than ten years after it was commenced. No cause of action for maladministration was incorporated into the complaint until the reorganization of the action. *Held*, that no action to enforce the alleged liability of such officers and directors was commenced against them until such amended complaint was served.

11. Where a new cause of action is introduced as an amendment to a pleading, the statute of limitations runs thereon until the making of the amendment.

12. A joint demurrer to a complaint for insufficiency on behalf of several defendants is bad if the complaint states a cause of action against any one of them.

13. In an action by creditors and the receiver of an insolvent corporation against stockholders, officers and directors, and a former receiver thereof, allegations that the former receiver collected various sums of money belonging to the corporation, both before and after his appointment, which he converted to his own use, and also gross mismanagement as receiver, states a cause of action against him in favor of the plaintiff receiver, but not in favor of the creditors of the corporation.

14. Where each of several demurrers to a complaint is based on an alleged misjoinder of several causes of action, and the complaint fails to state facts sufficient to constitute a cause of action as to one, such cause of action will not be considered in determining the alleged misjoinder.

15. A complaint by certain creditors and the receiver of a corporation against a former receiver and directors and stockholders, stating an independent cause of action against such former receiver in favor of the new receiver, and also stating a cause of action in favor of the creditors against the directors and certain shareholders, is held bad for misjoinder of causes of action.

CASSODAY, C. J., dissents.

APPEALS from orders of the circuit court for Eau Claire county: JAMES O'NEILL, Circuit Judge. Appeal from one order *dismissed;* appeal from other order *affirmed.*

This action was commenced November 13, 1890, by the defendants *John S. Owen* and the *Northwestern Lumber Company,* as creditors, in their own behalf, and as representing all others similarly situated, against the *Mutual Fire Association of Eau Claire,* to have it adjudged insolvent, and to wind up its affairs. On the same day the association put in a verified answer, admitting the essential facts, and November 15, 1890, the defendant *James A. Smith* was appointed receiver of the corporation, and on the same day qualified as such. June 30, 1899, *Smith* was removed, and the plaintiff *Boyd* was duly appointed receiver in his place. Upon the petition of *Boyd,* as such receiver, and some of the creditors, who are now plaintiffs, the action was reorganized May 8, 1900, by making those who were then plaintiffs defendants with the association, and by bringing in all the additional persons now named as defendants herein, and making such petitioners, who were and are creditors of the corporation, plaintiffs herein. Such new plaintiffs were thereupon ordered by the court to prosecute the action for the benefit of all the creditors of the corporation. Accordingly, such new plaintiffs and *Boyd,* as receiver, filed and served an amended complaint. To such amended complaint thirteen demurrers were interposed; three of them by a single defendant, and the other ten by two or more defendants, as they deemed their interests to be similar. Each of the thirteen demurrers were upon the same grounds, to wit:

"First, that it appears upon the face of said complaint that said complaint does not state facts sufficient to constitute a cause of action as against them or either of them; second, for that it appears upon the face of said complaint that several causes of action have been improperly united; third, that it appears upon the face of said complaint that the action was not commenced within the time limited by law, and

was not commenced within the time limited by secs. 4219, 4221, 4222, 4224, 4227, and 4252 of the Revised Statutes of Wisconsin for the year 1878, and of the Revised Statutes of Wisconsin for the year 1898, reference to which sections is hereby made."

A fourth ground is mentioned, but, as it is expressly waived by counsel for defendants, it is unnecessary to state it. This is an appeal from an order sustaining each of such thirteen demurrers, or rather thirteen orders, embodied in one paper, each sustaining some particular one of such demurrers; and also from an order refusing to state the particular ground upon which such demurrers were sustained.

Omitting formal matters, the substance of the amended complaint, so far as necessary to an understanding of the questions presented for decision on this appeal, is, in addition to the facts stated, to the effect that the *Mutual Fire Association* was incorporated September 1, 1885, under ch. 89, R. S. 1878, and did business as an insurance company from that time till it was adjudged insolvent, as hereafter stated. The articles of incorporation contained the following:

"All persons holding contracts of insurance with this corporation, and the heirs, executors, administrators, successors or assigns of such persons continuing to be so insured shall thereby become members of this corporation, and shall continue to be such members during the continuance of such respective contracts of insurance, and no longer."

As soon as the corporation was organized, its directors and officers, all of whom are named as defendants herein, agreed to disregard the statutes of this state as to the manner such corporation should do business, and to pursue a plan of their own, one feature of which was that no assessment should be made upon any member of the corporation to meet any of its liabilities, whereas the statute requires such assessments to be made. That plan was followed till the corporation was declared insolvent. Another feature of the agreement, made as aforesaid, and which was carried out, was that two kinds of

policies should be issued,—one called "cash policies," covering periods of one year or less, each policy being issued for a single cash premium paid down; the other kind being those issued for three or five years, the policy holder in each case giving a premium note payable in instalments as needed and called for by corporate authority to pay losses and expenses of the company. From the beginning to the end all the officers and directors of the corporation were interested in property insured by the company, and their aim was to obtain cheap insurance for themselves, regardless of its jeopardizing the ability of the company to furnish safe insurance to outside parties. To that end such officers and directors knowingly charged for carrying risks some thirty per cent. less than they knew would be necessary to do so and pay the expenses of the corporation and claims upon policies as they accrued, the idea of such officers and directors being that by such method their own risks could be carried for a few years at a very low rate, and the corporation then be allowed to go into insolvency, and the accumulated liabilities, representing losses in the business, be thrown on outside parties, such as plaintiffs.

The scheme worked successfully for about two years, during which time no assessment was made on members of the corporation to pay losses or expenses, all being paid by using money as fast as collected to pay matured claims. To accomplish that, the sixty days after a proof of loss, allowed by the insurance contract for payment thereof, was taken in all cases. In the fall of 1887, in order to continue business in the manner aforesaid, more than sixty days was taken for the payment of losses suffered by policy holders and duly proved. Before the end of that year it became necessary to either abandon such method, and resort to assessments upon members of the corporation, or obtain money by borrowing, or to cease doing business altogether. That condition was created by disregarding the legal requirement to collect money from

members of the corporation sufficient for a fund to pay losses as they matured. The difficulty was tided over temporarily by the officers and directors, without knowledge of the other members of the corporation, borrowing large sums of money. Money was so obtained prior to February 27, 1888, to the amount of $10,746.76, from eighteen different persons and corporations, all of whom are named in the complaint, and the amount borrowed of each stated. That method was continued till the new receiver was appointed, as stated; the total indebtedness incurred in that way being about $26,254. When it was apparent to the officers and directors of the corporation that it could not continue doing business much longer, pursuant to the plan agreed upon, as aforesaid, they planned to have it wound up by proceedings commenced in an adversary way by creditors, but really upon their own motion, though to delay matters as long as possible to enable them to gather in as much money as possible, and apply the same in payment of the borrowed money in preference to the claims of policy holders. A part of the plan from first to last of doing the corporate business was not to keep books, so the real situation could not be readily discovered, and such plan was effectually executed. For that reason all the details of the borrowing operations resorted to as aforesaid cannot be stated. But the indebtedness of the corporation created by such operations steadily increased from the time that method of obtaining money was resorted to till the corporation was declared insolvent, notwithstanding the officers and directors well knew that the collapse thereof was only a question of a short time.

In order to obtain new members of the corporation and retain old ones, false representations of its condition were made, by which means plaintiffs and others were so deluded. Such false representations consisted, in the main, of the following: Money was given to persons who had paid the same into the

corporation on premium notes, ostensibly as a legitimate division of a surplus over and above what was necessary to satisfy its needs for expenses and the payment of losses to policy holders. Policies were canceled, and money returned to the holders thereof as return premiums, when it was required to pay the *pro rata* share of such policy holders necessary to meet its then existing liabilities. In February, 1887, on false representations made by the officers and directors, a certificate was obtained of the commissioner of insurance of the state of Wisconsin to the effect that the corporation had available assets in cash and premium notes to meet future losses to the amount of $90,021.66, and the certificate was made public. Statements were made, ostensibly in compliance with sec. 1941*d*, R. S. 1878, in which the assets of the corporation were overstated from forty to two hundred per cent., and its liabilities understated from five to seventy per cent., the degree of falsity being least at the start and increasing from year to year up to the time of the final collapse of the company. In the reports so made no mention was made of the indebtedness of the corporation for borrowed money, though a true statement in that regard was required by law as a part of such reports; and, notwithstanding the fact that when such reports were made indebtedness of the corporation for borrowed money existed as before stated. Copies of such reports were made public. All the officers and directors of the corporation from first to last were parties to the acts of misfeasance and malfeasance aforesaid, and to other acts by which its indebtedness was increased and assets lost to the injury of the corporation and its creditors as follows: A large number of policies were issued on property and to persons outside the state where it had no lawful right to go, by which premium notes were taken aggregating $85,000, which were worthless.

Between January 5, 1889, and November 15, 1890, the officers and directors took from the corporate treasury

$26,078.20, and appropriated it to their own use by applying the same in payment of their own debts. A detailed statement of the transactions in that regard is set forth in the complaint. Defendant *Smith,* while he was secretary and manager of the corporation, and under contract to turn into the corporate treasury the fees obtained by him as an insurance broker for procuring insurance in other companies, received for such fees $500, and converted the same to his own use. The officers and directors of the corporation, during the year 1890, misappropriated its funds to a large extent. A detailed statement of their doings in that regard was made a part of the complaint, showing that among the sums so squandered was $281.73 which was paid to defendant *Smith* without consideration, and which he retained. The persons composing each board of directors and each executive committee of the corporation from the time of its organization to the time it was adjudged insolvent were named in the complaint, the last board of directors being composed of the following named persons: R. L. McCormick, *John S. Owen,* W. A. Rust, D. R. Moon, A. M. Bailey, J. T. Barber, H. E. Knapp, and W. J. Starr; and the last executive committee was composed of George B. Shaw, *John S. Owen,* J. T. Barber, D. R. Moon, and A. M. Bailey. By November 13, 1890, the officers and directors, with H. H. Hayden, finally perfected arrangements to cause the corporation to be wound up, a part of the plan being that a friendly receiver should be secured; that the secretary and manager of the corporation, the defendant *Smith,* should be suggested to the court, and his appointment secured; and that he, after coming into possession of the property of the corporation as receiver, while ostensibly performing his official duties, should use his position so as to save harmless the participants in such scheme from liabilities which they had incurred by reason of the manner in which the business of the corporation had been conducted as aforesaid. The agreement so made was fully carried out, so far as the

participants in the scheme could bring the same about by means of the action. Pleadings were made up in the action in form as if the proceedings were of an adversary character. The proceedings upon both sides were directed by the same hand, and in the interests of the participants in the aforesaid plan.

The corporation was in due form adjudged insolvent, and *Smith* was appointed receiver, November 15, 1890, and he duly qualified and took possession of the assets of the corporation. Thereafter he administered such assets until he was removed, ostensibly in a legitimate manner, but in fact in furtherance of the plan pursuant to which his appointment was secured. By reason of his misconduct expenses to the extent of $1,500 were incurred necessarily in efforts to remove him and to undo the wrongs done by him to the creditors. The amount which will ultimately be realized from the assets of the corporation will be less by $20,000 than it would have been had *Smith* faithfully performed his duties; that loss being largely due to the fact that in the meantime many members of the corporation have died, others have removed from the state, and others have become insolvent. During the progress of the action the receivers have obtained from the assets of the corporation $8,711.78. The sum of $65,000 more will be required to pay all the liabilities of the corporation established in the action.

During *Smith's* administration an assessment was duly made by the court in April, 1894, and confirmed July 13, 1896. After the liabilities of the persons so assessed became fixed by the order of the court, a demand was made upon each such person for payment of the amount for which such person was liable, but no part of the liability was discharged. Such a demand was made by the first receiver, and was repeated by the second receiver. November 13, 1899, by order of the court, an assessment of one hundred per cent. was made on so much of the premium notes in the hands of the receiver

as remained uncollected, and the same amount on the premium notes wrongfully released after the debtors were liable to assessment to the extent thereof to pay the debts of the corporation; also on cash premiums and money repaid by the corporation to the policy holders as unearned premiums after the same were applicable to the payment of the debts of the corporation. January 8, 1900, on demand and notice to all persons interested, such assessment was confirmed by the court, and the receiver directed to collect the same. Notice of such assessment and of the time limited for payment thereof was given to each person liable. More than thirty days elapsed thereafter without any payment of such assessments before the persons liable were brought into this action as defendants. All were so brought in. All the persons named in a tabulated statement, made a part of the complaint, were policy holders of the corporation, having taken out one or more policies, and are liable to contribute a proportionate share of the money necessary to pay the liabilities of the corporation to the extent of the amounts assessed against them respectively. The statement shows the names of those who gave premium notes for policies, except such as have paid the receiver in full, or settled with him by order of the court; the names of all members except as aforesaid, who took out insurance, and were assessed for any reason, and are made defendants herein, being so designated as to be readily identified, members who became such as partners being designated by their firm name under an appropriate heading; the place of residence of each policy holder while he was a member of the corporation; the number of each policy and note assessed; the kind of policy issued to each policy holder, whether cash or on the mutual plan, as to each policy holder; the period for which each policy ran; the date of the contemplated cancellation or surrender as to each policy so dealt with; the date of each note and policy; the amount each note was given for; the cash premiums paid for short policies; the amount of each

of the assessments referred to as to each person affected thereby remaining unpaid, except interest from the time payment should have been made; the amount wrongfully paid to members, specifying as to each person so affected the amount received and claimed by him on the pretense that the corporation had earned enough and was competent to pay a dividend; the dates when dividends were paid; the total indebtedness as to each member, showing the policy or policies to which the indebtedness relates, interest only to be added from the time such indebtedness should have been paid. Notwithstanding the pretended cancellation of policies as above mentioned, the policies which the officers and directors attempted to terminate, and upon which money was paid back ostensibly as unearned premiums, continued as binding contracts, preserving the memberships of the holders thereof, and their liability to assessment for payment of all the debts of the association which existed or were contracted during the period of such membership; the fact being that the indebtedness of the association was so great at the times of such attempted cancellations that the entire amount of the premium notes was required to pay the same, in order that each member should bear his proportionate part thereof. The complaint closed with a prayer for judgment for $65,000, and for such relief against each and all of the defendants as the court should deem just and equitable.

L. A. Doolittle and *A. J. Sutherland,* for the appellants.

For the respondents there was a brief by *Frawley, Bundy & Wilcox,* and a separate brief signed also by *Wickham & Farr,* of counsel; and oral argument by *C. F. Bundy* and *T. F. Frawley.*

The following opinion was filed June 19, 1902:

CASSODAY, C. J. The numerous claims made against the very numerous defendants, the variety of questions involved, and the mixed condition of the things alleged, have called for

and received the very careful consideration of all the members of the court. For the delay in deciding the case the writer assumes the responsibility. Counsel for the plaintiffs have, in their brief, classified the thirteen demurrers according to the nature of the claims made against the respective demurrants, and numbered them from one to thirteen, consecutively, as they appear in the record. Counsel for the defendants have acquiesced in such classification, and given their views in respect to the same. For convenience, and to avoid confusion, we shall keep in view such classification, but not in the order stated by counsel. The most important question presented is whether the amended complaint states a cause of action, not barred by the statute of limitations, against any of the defendants.

1. Six of the demurrers call upon us to answer the question as to whether such amended complaint states such cause of action against the parties named as demurrants who at one time held policies in the corporation. Under the repeated and recent adjudications of this court there can be no question but that this must be regarded as a creditors' suit, brought in equity, under the statutes, to wind up the affairs of an insolvent corporation. Secs. 3216–3228, Stats. 1898. Such being the nature of the action, all the rights and liabilities of creditors, officers, stockholders, and members were to be worked out in this suit. *Gager v. Bank,* 101 Wis. 593, 77 N. W. 920; *Gager v. Marsden,* 101 Wis. 598, 77 N. W. 922; *Foster v. Posson,* 105 Wis. 99, 81 N. W. 123; *Finney v. Guy,* 106 Wis. 256, 82 N. W. 595; *Killen v. Barnes,* 106 Wis. 546, 82 N. W. 536; *Gores v. Field,* 109 Wis. 408, 84 N. W. 867, 85 N. W. 411; *Gager v. Paul,* 111 Wis. 638, 87 N. W. 875. Under such statutes the corporation was adjudged insolvent, and a receiver was appointed November 15, 1890. The statute provides:

"Whenever any corporation . . . authorized by law to make insurance shall become insolvent or unable to pay its

debts or shall neglect or refuse to pay its notes or evidence of debts on demand or shall have violated any of the provisions of its act of incorporation or of any other law binding on such corporation, any court having jurisdiction may, by injunction, restrain such corporation and its officers," etc. Sec. 3218.

The statute further provides:

"Such injunction may be issued upon the commencement of an action for the purpose of closing up the business of such corporation . . . by any creditor or stockholder of such corporation, or at any time thereafter upon proof of the facts required to authorize the issuing of the same. The court may in any stage of such action appoint one or more receivers to take charge of the property and effects of such corporation and to collect, sue for and recover the debts and demands that may be due and the property that may belong to such corporation, who shall in all respects possess the powers and authority conferred and be subject to all the obligations imposed upon receivers in other cases, and in all respects be subject to the control of the court." Sec. 3219.

So the statute further provides:

"Whenever any creditor of any corporation shall seek to charge the directors, trustees or other officers or stockholders thereof on account of any liability created by law he may commence and maintain an action for that purpose in the circuit court and may at his election join the corporation in such action." Sec. 3223.

In such an action the statute further provides:

"If the property of such corporation shall be insufficient to discharge its debts the court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him or so much thereof as shall be necessary to satisfy the debts of the corporation." Sec. 3226.

A member of such mutual insurance corporation must be regarded in a similar position to a stockholder of such association. The corporation having been adjudged insolvent, and a receiver thus appointed, the right to enforce any liabil-

ity against its members thereupon accrued. Such, in effect, is a recent ruling of this court. *Booth v. Dear,* 96 Wis. 516, 519–521, 71 N. W. 816. Thus, in an opinion by Mr. Justice BREWER, in the federal court, it was held:

"Where an insolvent corporation ceases to do business, and assigns all its property, including unpaid stock subscriptions, to trustees for the benefit of its creditors, the liability of its stockholders at once becomes absolute, and the statute of limitations begins to run in their favor, and against such creditors and trustees, immediately." *Glenn v. Dorsheimer* (C. C.) 23 Fed. 695.

If a cause of action accrued against any of such members at that time, then the statute of limitations began to run in favor of such member at that time. Secs. 4219, 4222, Stats. 1898. Thus it is stated by a standard text writer:

"Where the liability of the shareholder is immediate and primary, and not contingent on the obtaining of a judgment against the corporation, it is clear that the statute of limitations begins to run in favor of the shareholder when the debt matures against the corporation." Cook, Stockh. (3d Ed.) p. 301, § 225.

It is held in Ohio:

"Where a company has become insolvent, and made an assignment of all its property for the benefit of its creditors, the right of the creditors, or any of them, then accrues to commence suit against the stockholders on their liability under the statute, without any prior proceeding against the company, and the statute of limitations begins to run from that time against the right of action." *Barrick v. Gifford,* 47 Ohio St. 180, 24 N. E. 259.

To the same effect, *Younglove v. Lime Co.* 49 Ohio St. 663, 33 N. E. 234; *Davidson v. Rankin,* 34 Cal. 503; *Stilphen v. Ware,* 45 Cal. 110; *Bank of San Luis Obispo v. Pacific Coast S. S. Co.* 103 Cal. 594, 596, 37 Pac. 499; *Corning v. McCullough,* 1 N. Y. 47; *Hollingshead v. Woodward,* 107 N. Y. 96, 13 N. E. 621; *Washington Sav. Bank v. Butchers' & Drovers' Bank,* 107 Mo. 133, 17 S. W. 644.

In a Michigan case it is held:

"The statute of limitations begins to run as against such right of action immediately upon the dissolution of the corporation and the appointment of a receiver." *Webber v. Hovey,* 108 Mich. 49, 65 N. W. 619.

Thus it has been held in the supreme court of the United States:

"The statute of limitations is a bar to a suit, brought four years after a bank in South Carolina had permanently suspended specie payments, by a holder of its notes, to enforce the individual liability of the stockholders." *Terry v. McLure,* 103 U. S. 442.

We must hold that the statute of limitations began to run in favor of the policy holders in question November 15, 1890. All of such policies were issued between October 14, 1885, and August 1, 1890. None of the defendants who joined in the six several demurrers mentioned were made parties to this action until after May 8, 1900. Until they were so made parties, and the summons issued against them, the statute of limitations did not stop running in their favor; and this is so as to each of the six groups of such defendants. This has recently, in effect, been so decided by this court. *Gager v. Paul,* 111 Wis. 638, 647, 648, 87 N. W. 875. It is unnecessary to add anything to what is there said in the opinion of Mr. Justice DODGE.

As indicated in the statement of facts, twenty-five of such policies were issued and paid for at the time of delivery in cash, and continued for one year or less. The others, and by far the greater number, were issued on the mutual plan, and to continue for three or five years, for which premium notes were given, liable to assessments for losses and expenses from time to time as they accrued. This court has held, in effect, that, where insolvency occurs during the defendant's insurance in such mutual fire insurance company, the action of the court, under the statutes cited, in adjudging such insolvency and granting an injunction and appointing a receiver, oper-

ates to cancel such policy and all other existing policies in such company. *Davis v. Shearer,* 90 Wis. 250, 255, 62 N. W. 1050; *Dewey v. Davis,* 82 Wis. 500, 52 N. W. 774. The principle upon which those two cases were decided seems to be applicable here. So there is an additional reason why the statute of limitations began to run against all of such policy holders November 15, 1890; and the right of action was completely barred, as to them, before they were made parties to the action. The nine defendants who joined in demurrer No. 3 at one time held such cash policies which were surrendered before the expiration of the year, and it is here sought to recover from them the unearned premium. We must hold that the complaint fails to state facts sufficient to constitute a cause of action, not barred by the statute of limitations, as against such nine demurrants; and for that reason such demurrer was properly sustained. The same is true with demurrer No. 4, where it is sought to charge the non-resident demurrants with liability on such premium notes given by them for such mutual policies. The same is true with demurrer No. 5, where it is sought to charge a large number of resident demurrants by reason of assessments made upon such premium notes. The same is true with demurrer No. 6, where it is sought to recover from such demurrants unlawful dividends paid to them at various times between 1887 and 1890. The same is true with demurrer No. 11, where it is sought to charge certain resident demurrants by reason of assessments made upon such premium notes, and also to recover back from some of them moneys paid as pretended dividends and unearned premiums. The same is true with demurrer No. 13, where it is sought to charge the demurrant by reason of an assessment upon such premium note for a policy dated December 10, 1888.

2. Five of the demurrers call upon us to determine whether the amended complaint states facts sufficient to constitute a cause of action, not barred by the statute of limitations,

against the officers and directors of the corporation. There can be no question but that the allegations of their misconduct and malfeasance do constitute a cause of action against them. The important question is whether such cause of action is barred by the statute of limitations. Counsel for the plaintiffs claim that the cause of action did not accrue in favor of the creditors who are plaintiffs until they discovered the facts constituting the fraud. Stats. 1898, sec. 4222, subd. 7. To this counsel for the defendants reply that, if there were any facts to prevent the running of the statute, the burden was on the plaintiffs to plead and prove them. *Howell v. Howell,* 15 Wis. 55; *Tucker v. Lovejoy,* 73 Wis. 66, 40 N. W. 627. But there is another view of the question, which seems to be a complete answer to the contention that the statute is a bar to such cause of action. A learned and able text writer states, in effect, that the correct view, as clearly deduced from the mass of decisions on the subject, is that the officers and directors of a corporation are, in equity, trustees of an express trust for the benefit of shareholders and creditors, and hence are within the principle that the statute of limitations does not run in favor of such trustees as against the *cestui que trust.* 3 Thomp. Comm. Law Corp. § 4128. That such officers and directors are such trustees seems to be well established. *Simons v. Vulcan O. & M. Co.* 61 Pa. St. 202; *Pearson v. Concord R. Corp.* 62 N. H. 537; *Sweeney v. Sugar Refining Co.* 30 W. Va. 443, 4 S. E. 431; *Farmers' & Mer. Bank v. Downey,* 53 Cal. 466; *Wickersham v. Critenden,* 93 Cal. 17, 28 Pac. 788; *Bank of Mut. Redemption v. Hill,* 56 Me. 385; *Ellis v. Ward,* 137 Ill. 509, 25 N. E. 530. This court has expressly held:

"The directors and officers of an insolvent corporation are trustees for the creditors, and must manage its property and assets with strict regard to their interests." *Haywood v. Lincoln L. Co.* 64 Wis. 639, 26 N. W. 184.

The trust-fund doctrine, so called, recognized in that case, must be regarded as modified so far as creditors of a going

corporation are concerned. *Ballin v. Merchants Ex. Bank,* 89 Wis. 286, 61 N. W. 1118; *Hinz v. Van Dusen,* 95 Wis. 503, 507–509, 70 N. W. 657; *Slack v. Northwestern Nat. Bank,* 103 Wis. 57, 79 N. W. 51. But there is no doubt but that the managing officers of a corporation are at all times trustees for the corporation and its stockholders, and also for the creditors after the corporation is adjudged insolvent. Id. In fact, our statute on the subject, which is much broader than in some states, provides, among other things, that:

"Express trusts may be created: . . . (5) For the beneficial interests of any person or persons when such trust is fully expressed and clearly defined upon the face of the instrument creating it." Stats. 1898, sec. 2081, subd. 5.

The trust in the case at bar was necessarily and from the very nature of the corporation, "fully expressed and clearly defined" in the articles of incorporation. We must hold that the officers and directors of the association were trustees of an express trust. It follows that the statute of limitations did not run in their favor against the creditors of the corporation. This court has expressly held:

"The statute of limitations has no application in the case of an express trust where there has been no denial or repudiation of the trust." *Bostwick v. Dickson's Estate,* 65 Wis. 593, 26 N. W. 549; *Williams v. Williams,* 82 Wis. 393, 399, 52 N. W. 429; *Fawcett v. Fawcett,* 85 Wis. 332, 55 N. W. 405; *Taylor v. Hill,* 86 Wis. 99, 106, 56 N. W. 738.

Counsel for the defendants cite a large number of cases said to be to the contrary, but, so far as we have examined them, they are in actions by the corporation, or its receiver, or are otherwise inapplicable or distinguishable. We must hold that the statute of limitations did not run in favor of any of such officers or directors. The result is that the amended complaint states a good cause of action against the two defendants who joined in demurrer No. 1, since both were directors and one was treasurer. The same is true as to the defendants who joined in demurrer No. 7, including the ex-

ecutors of the will of D. R. Moon, deceased; and also the defendants who joined in demurrer No. 8, including the administrators of the estate of George B. Shaw, deceased; and also the defendants who joined in demurrer No. 10; and also the defendants who joined in demurrer No. 12, including the executors of the will of Ralph E. Rust, deceased,—since in each case such defendants were sought to be charged as officers and directors, or simply as directors, or as the representatives of such officers and directors. We perceive no good reason why such executors and administrators stand in any different position as to the statute of limitations pleaded than the deceased officers whom they represent. True, the defendants who joined in each of the two demurrers last named were only directors from October 15, 1885, to January 13, 1886, but they were liable for whatever malfeasance they were guilty of while in office, notwithstanding they had ceased to be directors before the commencement of the action. 1 Mor. Priv. Corp. § 563. The mere fact that the amended complaint seeks to charge the two defendants who joined in demurrer No. 1 as members of the corporation, upon which claims the statute of limitations had run, does not prevent their being held liable as directors.

"A demurrer to the entire complaint is properly overruled where it is not good as to one of the causes of action stated." *Pinkum v. City of Eau Claire,* 81 Wis. 301, 51 N. W. 550.

So it is held:

"Where a complaint states a good cause of action as to certain failures of duty on the part of defendant, a general demurrer thereto will not be sustained merely because it attempts, but fails, to state other failures of duty." *Drefahl v. Connell,* 85 Wis. 109, 55 N. W. 160.

Each of the five demurrers last mentioned is based upon another ground, which will hereinafter be considered, and may be sustained.

3. A large number of the members of the corporation, including the *Northwestern Lumber Company,* joined in de-

murrer No. 2. The *Northwestern Lumber Company* was one of the plaintiffs which commenced the action November 13, 1890; and May 8, 1900, by order of the court, it was made defendant instead of plaintiff. Manifestly, the statute of limitations did not run in favor of that company, since it has been a party to the action ever since the suit was first commenced,—more than eleven years ago. This being so, the amended complaint stated a good cause of action against that company. Thus it appears that one of the demurrants against whom a good cause of action is stated is joined with a large number of members of the corporation in whose favor the statute of limitations had run. This court has repeatedly held:

"A joint general demurrer to a complaint for insufficiency on behalf of several defendants is bad if the complaint states a cause of action against any one of them." *Mark Paine Lumber Co. v. Douglas County Imp. Co.* 94 Wis. 322, 325, 68 N. W. 1013, and cases there cited.

The result is that we must hold that the amended complaint states a cause of action against the defendants who joined in demurrer No. 2. But that demurrer is based upon another ground, which will hereinafter be considered, and may be sustained. It will be observed that each and every of the twelve causes of action mentioned was in favor of the creditors of the corporation.

4. The remaining demurrer, No. 9, is interposed by *James A. Smith,* who was appointed receiver November 15, 1890, but who was never an officer or director of the corporation. The amended complaint seeks to charge him with having, prior to May 15, 1891, and while he was such receiver, wrongfully converted to his own use $500 belonging to the corporation; and also with having obtained, without consideration, on November 12, 1890, and before his appointment as receiver, $281.73, belonging to the corporation, and converting the same to his own use; and also with gross misconduct

in managing the receivership, whereby large sums of money were lost to the corporation. The facts alleged in the amended complaint are sufficient to constitute a cause of action against *James A. Smith* and in favor of the receiver *Boyd,* but not in favor of the creditors of the corporation. It therefore stands as an independent action in favor of the receiver and against *Smith.* His demurrer, however, like the other demurrers, is based upon another ground, which will now be considered.

5. Each of the several demurrers is in part upon the ground that it appears upon the face of the amended complaint that several causes of action have been improperly united. As indicated, the amended complaint fails to state facts sufficient to constitute a cause of action as against the defendants named in any one of the six demurrers first considered. It is well settled that they are not to be considered in determining whether several causes of action have been improperly united. *Bassett v. Warner,* 23 Wis. 673; *Truesdell v. Rhodes,* 26 Wis. 215; *Willard v. Reas,* 26 Wis. 540; *Lee v. Simpson,* 29 Wis. 333; *Schiffer v. Eau Claire,* 51 Wis. 385, 8 N. W. 253; *Hiles v. Johnson,* 67 Wis. 517, 30 N. W. 721. It is only where the complaint states two or more good causes of action that a demurrer will lie for misjoinder. Id. As indicated, the amended complaint states a good cause of action in favor of the creditors and against the defendants named in six of the demurrers, and also states a good cause of action in favor of the receiver *Boyd* and against the defendant *James A. Smith.* Is this independent cause of action in favor of *Boyd* properly joined with the causes of action in favor of the creditors? Under the repeated rulings of this court we must answer in the negative. *Barnes v. Beloit,* 19 Wis. 93; *Pier v. Fond du Lac Co.* 53 Wis. 432, 10 N. W. 686; *Shanahan v. Madison,* 57 Wis. 276, 283, 15 N. W. 154; *Linden Land Co. v. Milwaukee E. R. & L. Co.* 107 Wis. 493, 508, 509, 83 N. W. 851. It follows from what has

been said that demurrers numbered 1, 2, 7, 8, 9, 10, and 12 were each and all properly sustained, but only upon the ground that several causes of action are improperly united.

By the Court.—The appeal from the order of the circuit court refusing to state the grounds upon which such demurrers were sustained is dismissed. The several orders of the circuit court sustaining such demurrers are each and all affirmed, and the cause is remanded for further proceedings according to law.

On motion of respondent a rehearing was granted September 23, 1902, and the cause was reargued October 24, 1902.

L. A. Doolittle, for the appellants.

C. F. Bundy, for the respondents.

The following opinions were filed January 13, 1903:

BARDEEN, J. A rehearing of this case was granted on the sole question of whether the statute of limitations had run in favor of the officers and directors of the defendant corporation. In the opinion, *ante,* p. 155 (90 N. W. 1087) this court held that such statute had not run, basing such holding upon the proposition that such officers and directors were trustees of an express trust. We are now urged to reconsider and recede from that position.

It abundantly appears from the complaint that more than six years had elapsed between the time of the commission of the acts for which such officers and directors are sought to be held liable and the date they were made parties to this action, so that, unless they are brought within some rule which prevents the running of the statute, they may invoke it, and thus resist the claims sought to be enforced against them. Strictly speaking, this action is not one in which the creditors are seeking to hold the officers of the corporation as trustees for themselves. It is rather an action in the right of the corporation itself, and brought by the creditors on its behalf

because the corporation cannot or will not sue. It was not intended, nor can it be fairly inferred from the former opinion that we held, that the officers of a going corporation were trustees of creditors. We do not intend to abate one jot or tittle from the rule now firmly established in this state on the so-called "trust-fund doctrine." The recent cases of *Slack v. Northwestern Nat. Bank,* 103 Wis. 57, 79 N. W. 51; *Killen v. Barnes,* 106 Wis. 546–572, 82 N. W. 536, and *Hamilton v. Menominee F. Q. Co.* 106 Wis. 352, 81 N. W. 876, sufficiently indicate the position of this court, and by that position we are still disposed to stand. This action, being one in the right of and on behalf of the corporation, is open to any defense which the defendants might have urged, had the corporation itself brought the suit. The acts alleged against the officers are of misfeasance and malfeasance. No doubt can reasonably be entertained but that the corporation might have brought an action at law at any time within six years after the commission thereof. As between the corporation and its officers, the latter were liable in a straight action at law any time during the six years next after their shortcoming. It is not perceived how the fact that creditors must bring their suit in equity, when the corporation cannot or will not act, changes the relations of the parties. The creditors possess no greater right than the corporation. They are bound by the legal status of the parties, and cannot maintain this action *unless* the relation between the corporation and its officers is held to be such as to render the six-year statute of limitations inapplicable.

We have now reached the very heart of the controversy between the parties. The general rule of law was correctly stated in the opinion that "the statute of limitations has no application in the case of an express trust, where there has been no denial or repudiation of the trust." If, therefore, the officers and directors of a corporation are indeed trustees of an express trust, as heretofore held, that ends the con-

troversy. We are convinced, however, that we stated the rule too broadly in the former opinion. The rule quoted from Thompson on Corporations is not fully supported by the authorities. It is not easy to define with exactness the precise relation existing between a corporation and its stockholders, on the one side, and the officers and directors, on the other. The latter are certainly not trustees of an express trust, under the statute mentioned in the opinion. In *Lamberton v. Pereles,* 87 Wis. 449, 459, 58 N. W. 776, this court, by the present Chief Justice, said:

"In this state we have no statute making the chapter on uses and trusts, or any part of it, applicable to personal property."

The officers of a corporation have no title to its real property, so that they do not become express trustees under the statute. Neither have they the legal title to either the personal property or the stock of the corporation. Their relation to the corporation is thus defined in 2 Pomeroy, Eq. Jur. § 1089:

"The directors and supreme managing officers of corporations are constantly spoken of as trustees. They are not, however, true trustees, with the corporation or the stockholders as their true *cestuis que trustent,* since they hold neither the legal title to the corporate property, nor that to the stock. In fact, directors are clothed at the same time in a double character—that of *quasi* trustees and that of agents."

The English court, in *Ex parte Chippendale,* 4 De Gex, M. & G. 19–52, speaking of this relation, says:

"Although directors undoubtedly stand in the position of agents, and cannot bind their companies beyond the limits of their authority, they also stand, in some degree, in the position of trustees."

The supreme court of Pennsylvania, considering this same question, said:

"It is by no means a well-settled point what is the precise relation which directors sustain to stockholders. They are undoubtedly said in many authorities to be trustees, but that,

as I apprehend, is only in a general sense, as we term an agent or any bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries," etc. *Spering's App.* 71 Pa. St. 11.

The Tennessee court speaks of the matter thus:

"Directors are not express trustees. . . . They are mandataries. They are agents. They are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith." *Wallace v. Lincoln S. Bank,* 89 Tenn. 630–649, 15 S. W. 448. See *Pearson v. Concord R. Corp.* 62 N. H. 537; *Bank of Mutual Redemption v. Hill,* 56 Me. 385; *Landis v. Saxton,* 105 Mo. 486, 490, 16 S. W. 912.

Expressions of this kind without number might be cited without getting any nearer exactitude of definition of this relation. No court that we are aware of has ever defined the relation as broadly as was stated in the former opinion by this court. We therefore withdraw the statement that such officers and directors are trustees of an express trust, as defined by sec. 2081, Stats. 1898.

We will now take up the question of whether their relation is such that, under the circumstances alleged in the complaint, they cannot avail themselves of the benefit of the statute of limitations. At this point we are met by a divergence in the authorities. One line of cases, of which *Williams v. McKay,* 40 N. J. Eq. 189, is a type, holds that the managers of a savings bank stand in the relation of trustees to depositors, so that the statute of limitations will not be a bar against a charge of mismanagement on their part which had occurred more than six years before the filing of the bill. See *Ellis v. Ward,* 137 Ill. 509, 25 N. E. 530; *Southern M. Ins. Co. v. Pike,* 32 La. Ann. 483; *Coxe v. Huntsville G. L. Co.* 106 Ala. 373, 17 South. 626; *Hightower v. Thornton,* 8 Ga. 486. The ruling in the New Jersey case seems to have been based expressly upon the holding that the relation between the di-

rectors and depositors (who were mere creditors) was similar to that of trustee and *cestui que trust,* and that the right of the depositor was a purely equitable one, which he could not enforce in a court of common law. 40 N. J. Eq. 198. It is perfectly evident that this court cannot follow this decision without overruling a large line of cases repudiating the trust-fund doctrine. Neither the corporation nor its governing body, so long as it is a going concern, holds its property in trust for creditors. The officers or directors occupy a fiduciary relation, demanding care, vigilance, and good faith. If they violate their duty, they at once become responsible to the corporation. If they are guilty of misfeasance or malfeasance, the latter may at once bring an action at law to enforce such liability. If the corporation refuses to act, the stockholders before insolvency, and the creditors after insolvency, may enforce such liability in the right of the corporation, and not otherwise. Such right is not based entirely upon the relation of trusteeship sustained to the creditors, but rather upon the legal right of the corporation to compel them to make reparation for their wrong. The right of the creditor to enforce the rights of the corporation may be said to rest upon the so-called fiduciary relation which the officers sustain to the corporation, and indirectly to them. The fact that the creditor must sue in equity does not alter the situation. The application of the statute of limitations in equity is determined by the cause of action stated, rather than by the nature of relief demanded. *Hughes v. Brown,* 88 Tenn. 578, 587, 13 S. W. 286. The cause of action stated in the complaint being one in the right of the corporation, and one which it might have enforced in an action at law, it becomes susceptible to such objections as the recalcitrant officers might have urged, had the corporation brought the suit.

The case of *Ellis v. Ward,* 137 Ill. 509, 25 N. E. 530, much relied upon, is bottomed upon two facts which this court cannot recognize as substantial. One is "that the assets of a

corporation are, in equity, a trust fund," and the other is that the relation between the officers and the corporation has "all the elements of an express trust." The case of *Southern M. Ins. Co. v. Pike,* 32 La. Ann. 483, was one where the directors intrusted the accounts and assets of the company to one who united in himself the offices of president and cashier, and who died without rendering an account of his trust. The court held that prescription did not run on a demand for a return of the property until the heir had done some act equivalent to a repudiation of the trust. We have no quarrel with the holding. *Coxe v. Huntsville G. L. Co.* 106 Ala. 373, 17 South. 626, simply holds that the right of a corporation to require an accounting from its president, who was also its general manager and controlled and managed all its affairs for many years, cannot be barred by the statute of limitations when it is shown that the failure to assert the right sooner was due to the refusal of said officer to allow an examination of his books, and to his deception and misrepresentation as to the condition of corporate affairs. The decision rests upon the fraud of the officer, and misrepresentation to the governing body. The case of *Hightower v. Thornton,* 8 Ga. 486, may be dismissed with the following quotation from the opinion:

"As to the statute of limitations, it need only be said that this is a case of a direct trust, purely technical, not cognizable at law, but falling within the proper, peculiar, and exclusive jurisdiction of a court of equity."

This review of the authorities cited in support of the appellants' position is sufficient to show the difficulty this court must experience in attempting to follow them. On the other hand, there is a clear line of authorities taking a contrary view. In the case of *Kane v. Bloodgood,* 7 Johns. Ch. 90, Chancellor KENT speaks on the subject as follows:

"The objection that the society held the money in question in the character of trustees, and that it was a trust which, upon equity principles, was not within the statute, has been

the main object of discussion in the cause; and there is ground for a good deal of embarrassment in the examination of the question, arising from the loose manner in which the rule is often mentioned in the books, and the want of consistency, as well as precision, in the series of cases applicable to the point. I cannot assent to the proposition that all cases of direct and express trust, and arising between trustee and *cestui que trust,* are to be withdrawn from the operation of the statute of limitations, notwithstanding a clear and certain remedy exists at law. The word trust is often used in a very broad and comprehensive sense. Every deposit is a direct trust. Every person who receives money to be paid to another, or to be applied to a particular purpose to which he does not apply it, is a trustee, and may be sued either at law for money had and received, or in equity, as a trustee, for a breach of trust. *Scott v. Surman,* Willes, 404. The reciprocal rights and duties founded upon the various species of bailment, and growing out of those relations, . . . are all cases of express and direct trust. . . . Are all such cases to be taken out of the statute of limitations, under the notion of a trust, when one of the parties selects his remedy in this court? A review of the decisions will enable us, as I apprehend, to deduce from them a safer and sounder doctrine, and to establish upon the solid foundations of authority and policy this rule:

"That the trusts intended by the courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court."

From his view of the authorities, it may be said that as long as there is a continuing and subsisting trust, acknowledged or acted upon by the parties, the statute does not apply, but if the trustee denies the right of his *cestui que trust,* and the holding becomes adverse, lapse of time from that period may constitute a bar in equity, but other trusts which are the ground of an action at law are not exempted from the operation of the statute. *Mason v. Henry,* 152 N. Y. 529, 46 N. E. 837, was an action by the receiver of an insolvent insurance company to compel a trustee (holding the same office as a

director under our statutes) to account for assets fraudulently misapplied by him. The court held that the receiver, as the representative of the corporation, might have sued the defendant, in an action at law, for the damages sustained from his misconduct, or in equity, as he did, to compel an accounting as to the property wasted and lost; that such action was barred by the lapse of six years between the misapplication and the commencement of the suit. *Pierson v. McCurdy,* 33 Hun, 520, affirmed in 100 N. Y. 608, 2 N. E. 615, holds pretty much the same doctrine. *Wallace v. Lincoln Savings Bank,* 89 Tenn. 630, 15 S. W. 448, was a suit against the officers and directors of a corporation for losses caused by their neglect and mismanagement of the corporate affairs. The following propositions were decided: That primarily such a suit was maintainable at law by the corporation alone, but creditors might maintain the action in equity when the corporation was disabled to sue or wrongfully refused to sue; that such suit, whether brought at law by the corporation itself, or in equity by a creditor, was alike subject to the bar of the statute of limitations; and that the six-year statute was the one that was applicable. So in a later case (*Cullen v. Coal Creek M. & M. Co.* [Tenn.] 42 S. W. 693) a demurrer to a bill against directors of a corporation for malfeasance in office was sustained after the lapse of six years, on the ground that such directors were not such direct or technical trustees as to take the case without the statute. See *Hughes v. Brown,* 88 Tenn. 578, 13 S. W. 286. The supreme court of Missouri followed substantially the same rule in an action brought against the secretary of a corporation for withholding money of the concern. *Landis v. Saxton,* 105 Mo. 486. In Indiana the rules above mentioned were applied in an action against public officers to recover moneys received by them under color of their offices; the court holding that, when money can be recovered in an ordinary action at law, the statute of limitations was a valid defense. *Newsom v.*

Comm'rs, 103 Ind. 526, 3 N. E. 163. In *Baxter v. Moses,* 77 Me. 465, 1 Atl. 350, it is said that the directors of a corporation hold the corporate property under an implied or constructive trust, and that one who is not actually a trustee, but upon whom the character is forced by a court of equity, may avail himself of the statute of limitations. See *Link v. McLeod,* 194 Pa. St. 566, 45 Atl. 340. Upon mature deliberation, we are disposed to adopt the view of the latter line of cases. It is plain that, however the relations of corporate officers to their corporation and its stockholders may be defined, such relations are not "technical and continuing trusts," cognizable solely in a court of equity, which Chancellor KENT declares are the only trusts not affected by the statute of limitations. The various causes of action stated in the complaint for misapplication of funds were rights of action in favor of the corporation, upon which actions at law could have been commenced when the act was done. The plaintiffs here are simply seeking to enforce the right of action of the corporation. They have no greater right than it possessed.

Our statute (sec. 4206) is general and comprehensive, and in itself makes no exception as against trustees of any kind; and, while we are not inclined to deny or question the authority of the precedents in this court importing into that statute certain exceptions, we are unwilling to assume a practically legislative function, by adding other exceptions which we might deem wise, which the legislature, in the exercise of its constitutional discretion, has not seen fit to make. Those precedents are cited in the former opinion. Several of them go nearly to the extent of exempting express trusts within the statute, but two of them suggest like exception in certain other cases. *Howell v. Howell,* 15 Wis. 55, and *Fawcett v. Fawcett,* 85 Wis. 332, 55 N. W. 405. The first of these is of but little significance, for in it was no attempt to declare how far the exemption from statutes of limitation does extend, but merely that it does not extend beyond "ex-

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press or acknowledged trusts," and liability to account for proceeds of land wrongfully purchased with moneys of plaintiff was held barred by limitation. In *Fawcett v. Fawcett,* however, the limitation was extended to a resulting trust arising upon purchase of land in his own name by a husband with his wife's money; such resulting trust having been acknowledged by him, and having continued unrepudiated during their cohabitation to his death. The statute was held not to apply, because the trust was wholly beyond cognizance of courts of law, and had the characteristics of acknowledgment, continuance, and certainty. Chancellor KENT's classification of trusts in *Kane v. Bloodgood,* 7 Johns. Ch. 90, was adopted; among other parts, the declaration being that "other trusts which are the ground of action at law are not exempt." It seems plain, therefore, that nothing in the prior decisions of this court have established immunity from limitation statutes in favor of any trusts, other than "those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this [chancery] court," as classified by Chancellor KENT. Obviously corporate officers are not trustees holding upon such a trust. It is not meant by this that they may not be, in a true sense, trustees of an express trust. While express trusts in real property can only be such as are defined and limited by sec. 2081, Stats. 1898, there may be many express trusts in personal property, as pointed out by Chancellor KENT in the case above cited, which are entirely independent of the trusts in real property referred to in sec. 2081. It may well be that corporate officers, so far as they handle and control the personal property of the corporation, may rightly be called trustees of an express trust, of which trust the corporation and its stockholders are the beneficiaries. 1 Perry, Trusts (5th Ed.) § 86. But so far as they may be sued at law, they do not come within the chancellor's classification, and hence the running of the statute of limitations is not in-

terrupted. As already pointed out, their misapplication of funds might at any time have been reached by an action at law by the corporation. The right to sue arose when the act was done. If the alleged conspiracy as to mismanagement continued down to the death of the corporation, still, as we understand it, the demurring defendants were not made parties to this suit until more than six years thereafter. An action at law might have been instituted by the receiver immediately after this appointment, as to all acts not then barred by the statute. *Mason v. Henry,* 152 N. Y. 529, 46 N. E. 837; *Wallace v. Lincoln Savings Bank,* 89 Tenn. 630, 15 S. W. 448.

We are fully impressed with the weight of the reasons supporting and opposing such exemption as is claimed in this action against directors and officers of corporations. The peril to the public in becoming either stockholders or creditors, in view of the ample practical opportunity enjoyed by such officers to cover their malfeasance from the knowledge of any person other than themselves, and to control the action of the corporation, whether by way of investigation or suit, until the period of limitations shall have run, is a cogent consideration. On the other hand, in absence of limitation, such officers, and their estates after them, may be held liable for mere negligence at remote periods after their acts, when witnesses may be dead and books and records lost, so that defense against a *prima facie* case may be impossible, contrary to the policy of the law in all analogous situations. But after all, these are considerations of policy, with which the legislature can deal freely; and we feel induced to hold that as neither the statute nor the precedents of this court warrant exception from the protection of the limitation statutes of those who, though holding as fiduciaries and trustees, have at all times been liable to remedy by suit at law for their misconduct as such, we may not with propriety take from them that protection which the statute, in terms, gives. We hold,

therefore, that the limitation has run, and the action, in the respects mentioned, is barred, upon the allegations of the complaint. The five demurrers mentioned in the former opinion, in subd. 2, are therefore sustained on the ground herein stated, and such opinion is hereby modified accordingly.

By the Court.—So ordered.

CASSODAY, C. J. (dissenting). It is well settled that so long as there is a continuing and subsisting trust, acknowledged or acted on by the parties, the statute of limitations are not available to a trustee. *Kane v. Bloodgood,* 7 Johns. Ch. 90, 123, 124. The reason for the rule is that the trustee being clothed with the legal title or possession of the property, and charged with the duty of caring for and preserving the same for the benefit of the *cestui que trust,* the latter has the right to assume that the trustee will perform such duty, unless he has knowledge that the trustee has denied his right, or claimed the possession of the property adversely to him. Id. Until such denial or adverse claim, the possession of the trustee is, in equity, deemed to be the possession of the *cestui que trust. Smith v. Combs,* 49 N. J. Eq. 420, 24 Atl. 9; *Lindsley v. Dodd,* 53 N. J. Eq. 69, 84, 30 Atl. 896. True, the officers and directors of a corporation are not regarded, in law, as having the title or possession of the property of the corporation, both of which are deemed to be vested in the corporation itself. Nevertheless they have the actual care and custody of such property, and are chargeable in equity with an active duty in respect to the same, not only for the benefit of the corporation, but also for the benefit of the *cestui que trust.* When, therefore, such officers and directors, in violation of such duty, convert a large portion of the property of the corporation to their own private use, and there is no publicity of the fraud, they necessarily become chargeable in equity, as trustees of the property so fraudu-

lently converted, for the benefit of the *cestui que trust.* As to the property so converted, they hold the same as a continuing and subsisting trust, assumed and acted upon by themselves in violation of the duty to the *cestui que trust.* The mere fact that an action might have been maintained in the name of the corporation which was managed and controlled by the wrongdoers, against such wrongdoers, to recover back the money or property so converted, immediately after the conversion took place, is no ground, in my judgment, for holding that the statute of limitations commenced running in favor of such wrongdoers and against the plaintiffs at the time of such conversion. Thus, it is held in New Jersey:

"The managers of a savings bank stand in the relationship of trustees to the depositors, so that the statute of limitations will not be a bar against a charge of mismanagement on their part which had occurred more than six years before the filing of the bill." *Williams v. McKay,* 40 N. J. Eq. 189.

Again: "The treasurer of a savings bank, who was at the same time one of its managers, was charged by the receiver of the bank with dereliction and malfeasance in office. Held, that his position as manager made him a trustee, and that consequently the statute of limitations was not a defense to the bill." *Williams v. Reilly,* 41 N. J. Eq. 137, 3 Atl. 692.

These cases were followed in *Somerset Co. Bank v. Veghte,* 42 N. J. Eq. 39, 42, 6 Atl. 278; *Williams v. McDonald,* 42 N. J. Eq. 392, 396, 7 Atl. 866. So in a case in Illinois it is said in the opinion of the court:

"Ordinarily an express trust is created by a deed or will; but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist, and to which the same legal principles are applicable, and such appears to be the relation established by law between directors and the corporation." *Ellis v. Ward,* 137 Ill. 509, 520, 522, 25 N. E. 530. See, also, *Coxe v. Huntsville Gaslight Co.* 106 Ala. 373, 17 South. 626; *European & N. Am. Ry. Co. v. Poor,* 59 Me. 277, 278; *Butts v. Wood,* 38 Barb. 188; *Williams v. Page,* 24 Beav. 654.

In my judgment, there is less reason for holding that the statute of limitations runs in favor of such officers and directors in the case at bar than in a number of cases in this court wherein it has been held that the statute did not run by reason of such fiduciary or trust relation. *Sheldon v. Sheldon,* 3 Wis. 699; *Spear v. Evans,* 51 Wis. 42, 8 N. W. 20; *Bostwick v. Dickson,* 65 Wis. 593, 26 N. W. 549; *Second Nat. Bank v. Merrill,* 81 Wis. 151, 50 N. W. 505; *Williams v. Williams,* 82 Wis. 393, 52 N. W. 429; *Fawcett v. Fawcett,* 85 Wis. 332, 55 N. W. 405; *Taylor v. Hill,* 86 Wis. 106, 56 N. W. 738.

Such is a brief statement of a few of my reasons for dissenting from the decision on the motion for a rehearing in this case.

The following additional opinion was filed April 17, 1903:

PER CURIAM. One point suggested upon the rehearing is not mentioned in the foregoing opinion and deserves brief consideration. It is said that the defendant *John S. Owen,* a director of the corporation, who is charged with liability by the amended complaint, was a party to the action from the beginning, and hence that as to him the statute of limitations is not available as a defense. It is true that *Owen* was one of the plaintiffs in the action as originally brought in his capacity as an alleged creditor of the corporation; but the difficulty with the contention is that the action as originally brought was simply a plain action to wind up the corporation and distribute its assets, and did not include any cause of action against *Owen,* or any other officer, for maladministration, or to recover assets converted. No such cause of action was incorporated into the complaint until the reorganization of the action in May, 1900, when *Owen* and his coplaintiff were made defendants, and the amended complaint was served. Therefore no action to enforce such liabilities

can logically be held to have been commenced against *Owen* until such amended complaint was served. It is well settled that, when an amendment to a pleading introduces a new cause of action, the statute of limitations runs until the making of the amendment. 1 Ency. Pl. & Pr. 622, and cases cited in note 1; *Gager v. Paul,* 111 Wis. 638, 87 N. W. 875. See, also, *C. R. I. & P. R. Co. v. Young* (Neb.) 93 N. W. 922.

VERGES, Appellant, vs. MILWAUKEE COUNTY, Respondent.

November 28, 1902—January 13, 1903.

Counties: Constitutional law: Statutes: Local bill: Title: Body of act: Uniformity: Fees: Register of deeds: Special laws.

1. Ch. 169, Laws of 1895, provides that in counties having a population of 150,000 or upwards the register of deeds shall receive in lieu of fees a certain salary, and that the act shall go into effect fifteen months after its passage. The act is entitled "An act to make the register of deeds' office of Milwaukee county a salaried office." *Held:*

   (1) That the character of the act is to be determined by its provisions and not by its title, and that the body of said ch. 169 is general in its application.

   (2) That said ch. 169 does not conflict with sec. 18, art. IV, Const., providing that no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title.

   (3) That the general provisions are not rendered void by reason of their being contained in the same act with other provisions of merely local application, though the title of the act refers to the latter provisions only.

   (4) That the act applies to and embraces within its operation any and all counties answering the requirement when the act went into effect.

2. Sec. 18, art. IV, Const., provides that no private or local bill shall embrace more than one subject, which shall be expressed in the title. Ch. 169, Laws of 1895, entitled "An act to make the register of deeds' office of Milwaukee county a salaried office," provided, in the body, for salary in lieu of fees for the register

of deeds in any county of 150,000 population or over. *Held*, that the act is not repugnant to said constitutional provision, since it is not required that the title go further than to express the subject covered by the body of the law, and, the statement of the primary purpose being in general terms, reasonably includes all the means designated to facilitate the accomplishment thereof.

3. Prior to the time ch. 169, Laws of 1895, took effect, the register of deeds of Milwaukee county was compensated by fees and not by a salary, but that statute placed his office on a salary basis, and provided that the register should quarterly pay to the county treasurer all fees and emoluments of "every kind" received by him as register. Such provision was continued in the revision of 1898 which took effect September 1, 1898. *Held*, that such statutory provisions embraced fees for registering of births, marriages, and deaths.
4. Ch. 169, Laws of 1895, provided that the register of deeds in counties containing 150,000 population or upwards should be compensated by a salary, instead of fees, as had previously been the method of compensation, and required from the register a bond conditioned for the faithful accounting for and paying over all moneys which came to his hands as such officer. There was no change in the manner of the election of the register, the clerks in the office were his appointees, as had been the case before the enactment of said ch. 169, and the bond covered the fees that had formerly belonged to the register, but which, under the act, belonged to the county. *Held*, that the act in no way attempted to change or interfere with the then existing system of county government, and did not conflict with sec. 23, art. IV, Const., providing that "the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable."
5. Ch. 169, Laws of 1895, does not violate sec. 1, art. VIII, Const., providing that the rule of taxation shall be uniform, and that taxes shall be levied on such property as the legislature shall prescribe. The fees paid by the citizens for recording, whether under the fee or salary system, cannot be said to be a tax.
6. Ch. 169, Laws of 1895, being a general law, does not violate subd. 6, sec. 31, art. IV, Const., which prohibits the enactment of any special or private laws for assessment or collection of taxes.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

This is an appeal from an order sustaining a general demurrer to the plaintiff's complaint in an action to recover

$21,820.25, alleged to be due and payable to the plaintiff for the collection of fees received by him during his two terms of office as register of deeds of Milwaukee county from January 4, 1897, to January 7, 1901. The complaint alleges, in effect, that the plaintiff, as such register of deeds in and for said county during the period above mentioned, was entitled to receive, for the various services performed by him, the amount and rate of fees prescribed by sec. 764, R. S. 1878; that the amount of such fees so received by him during such two terms of office for recording and filing documents, for certified copies of documents, and for searches and releases, amounted in the aggregate to $58,889.71; that the plaintiff and defendant during such term of office assumed ch. 169, Laws of 1895, to be valid and constitutional, and in compliance therewith the plaintiff paid into the treasury of said county the sum of $58,889.71, and also a further sum of $101.16, received from the secretary of state for the making by the plaintiff of his annual statistical returns,—making in all the aggregate sum of $58,990.87; that during the period of plaintiff's term of office the county paid out of its treasury for the salaries fixed by ch. 169, Laws of 1895, and for expenses of said office, the sum of $61,481.11, leaving an excess of moneys paid out by the county over the amount received from the earnings of the plaintiff and his subordinates of $2,490.24; that during the plaintiff's two terms of office he caused to be registered, according to the provisions of sec. 764, R. S. 1878, all the deaths, marriages, and births in said county, for which he was entitled to receive the aggregate amount of $24,310.49; that, after giving the defendant county credit for the excess of the $2,490.24, mentioned, there remains due to the plaintiff the sum of $21,820.45, for which the plaintiff demands judgment, together with costs and disbursements of this action.

For the appellant there was a brief by *Van Wyck & Groth*, attorneys, and a separate brief by *T. W. Spence*, of counsel,

and oral argument by *Mr. Howard Van Wyck* and *Mr. Spence.* They contended, *inter alia,* that ch. 169, Laws of 1895, is a local bill or law within the meaning of the constitution. *Durkee v. Janesville,* 26 Wis. 697, 700; *Mills v. Charlton,* 29 Wis. 400; *Phillips v. Albany,* 28 Wis. 340; *Lawson v. M. & N. R. Co.* 30 Wis. 597; *Yellow River Imp. Co. v. Arnold,* 46 Wis. 214, 222; *Anderton v. Milwaukee,* 82 Wis. 279, 285; *Ryan v. Outagamie Co.* 80 Wis. 336; *Coutieri v. New Brunswick,* 44 N. J. Law, 58; *People v. Sup'rs,* 43 N. Y. 22; *Montgomery v. Comm.* 91 Pa. St. 125; *Devine v. Comm'rs Cook Co.* 84 Ill. 590; *Comm. v. Patton,* 88 Pa. St. 258; *State ex rel. Harris v. Herrmann,* 75 Mo. 340; *Milwaukee Co. v. Isenring,* 109 Wis. 9. A statute cannot have an operation beyond the purposes set forth in its title, and the title may be resorted to in restraint of generality of act. *Bates v. Nelson,* 49 Mich. 459; *Booth v. Eddy,* 38 Mich. 245; *Ryerson v. Utley,* 16 Mich. 269; *Field v. Gooding,* 106 Mass. 310. Sec. 18, art. IV, of our constitution was probably borrowed from the constitution of the state of New York (sec. 16, art. III), which is in the same language and has received the construction contended for. *Connor v. New York,* 5 N. Y. 285; *People v. Hills,* 35 N. Y. 453; *People v. O'Brien,* 38 N. Y. 193; *Matter of Town of Flatbush,* 60 N. Y. 407; *Matter of Mayor of New York,* 99 N. Y. 577; *People v. Sup'rs,* 43 N. Y. 10, 22; *Johnston v. Spicer,* 107 N. Y. 185; *Astor v. Arcade R. Co.* 113 N. Y. 109. The following cases illustrate the decisions under such provisions, wherein various acts have been held to be void because in conflict with those provisions of the constitution. *Anderson v. Whatcom Co.* 15 Wash. 47, 33 L. R. A. 137, 141; *State ex rel. Wagner v. Sullivan,* 73 Minn. 382, 76 N. W. 224; *Simard v. Sullivan,* 71 Minn. 517, 74 N. W. 280; *Palmer v. Bank of Zumbrota,* 72 Minn. 266, 75 N. W. 380; *State ex rel. Brun v. Oftedal,* 72 Minn. 498, 75 N. W. 692; *State ex rel. Keith v. Chapel,* 63 Minn. 355, 65 N. W. 940; *In re Snyder,* 108

Mich. 48, 65 N. W. 562; *Lansing v. Board of State Auditors,* 111 Mich. 327, 69 N. W. 723; *State ex rel. Graham v. Tibbets,* 52 Neb. 228, 71 N. W. 990; *Rex L. Co. v. Reed,* 107 Iowa, 111, 77 N. W. 572; *Parfitt v. Ferguson,* 159 N. Y. 111, 53 N. E. 707; *O'Mara v. Wabash R. Co.* 150 Ind. 648, 50 N. E. 821; *State v. Scholl,* 58 Kan. 507, 49 Pac. 668; *State ex rel. Norcross v. Washoe Co.* 22 Nev. 421, 41 Pac. 145; *Mitchell v. Colorado M. & E. Co.* 12 Colo. App. 277, 55 Pac. 736; *Land-Title, W. & S. D. Co. v. Tanner,* 99 Ga. 470, 27 S. E. 727; *Bank v. Divine G. Co.* 97 Tenn. 603, 37 S. W. 390; *Steenken v. State,* 88 Md. 708, 42 Atl. 212; *Hardy v. Orange,* 61 N. J. Law, 620, 42 Atl. 581; *Lindsay v. U. S. S. & L. Co.* 42 L. R. A. 783; *N. P. Ex. Co. v. Metschan,* 90 Fed. 80; *Sanders v. Elmore Co. Comm'rs,* 117 Ala. 543, 23 S. W. 788; *State v. Nomland,* 3 N. Dak. 427, 57 N. W. 85; *Blair v. State,* 90 Ga. 326, 35 Am. St. Rep. 206; *Philadelphia v. Ridge Ave. R. Co.* 142 Pa. St. 484, 24 Am. St. Rep. 512; *Davis v. State,* 61 Am. Dec. 331, 337. Ch. 169, Laws of 1895, violates the rule of uniformity of county government. Art. IV, sec. 23, Const.; *Rooney v. Milwaukee Co.* 40 Wis. 23, 27; *State ex rel. La Valle v. Sauk Co.* 62 Wis. 376; *State ex rel. Peck v. Riordan,* 24 Wis. 484; *State ex rel. Keenan v. Milwaukee Co.* 25 Wis. 339; *State ex rel. Walsh v. Dousman,* 28 Wis. 541; *McRae v. Hogan,* 39 Wis. 529; *C. & N. W. R. Co. v. Forest Co.* 95 Wis. 80; *Wagner v. Milwaukee Co.* 112 Wis. 601; *State ex rel. Kennedy v. Brunst,* 26 Wis. 412. Ch. 169, Laws of 1895, violates the rule of uniformity of taxation. Art. VIII, sec. 1, and art. IV, secs. 31, 32, Const.; *Knowlton v. Rock Co.* 9 Wis. 410, 419; *Lumsden v. Cross,* 10 Wis. 284; *State ex rel. Sanderson v. Mann,* 76 Wis. 469; *State v. Gorman,* 40 Minn. 232; *In re Ruan St.* 132 Pa. St. 257, 19 Atl. 219; *Crandon v. Forest Co.* 91 Wis. 242; *State ex rel. Turner v. Bell,* 91 Wis. 274; *C. & N. W. R. Co. v. Forest Co.* 95 Wis. 80.

For the respondent there was a brief by *F. E. McGovern,*

assistant district attorney, and oral argument by *William H. Bennett.*

CASSODAY, C. J. It is conceded that prior to 1897 the compensation of the register of deeds of Milwaukee county consisted of the fees prescribed by sec. 764, S. & B. Ann. Stats. During the two terms the plaintiff was in office—from January 4, 1897, to January 7, 1901—he received from such fees for recording and filing documents, and certifying to copies thereof, and for searches and releases, $58,889.71; for making his annual statistical return to the secretary of state, $101.16; and for registering marriages, births, and deaths, $24,310.49,—making in the aggregate $83,301.36 received by the plaintiff during the period mentioned for and on account of such fees; all of which, on the assumption that ch. 169, Laws of 1895, was valid, he paid over and into the treasury of the county; and during that period the plaintiff received from the county for salaries, as fixed by ch. 169, Laws of 1895, $61,481.11,—making a difference of $21,820.25 paid by the plaintiff to the county more than was received by the plaintiff from the county, for which amount he prays judgment

1. The important question in the case is whether ch. 169, Laws of 1895, is a valid enactment. It is contended that it is in violation of the constitutional provision which declares:

"No private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title." Sec. 18, art. IV, Const.

The act is entitled:

"An act to make the register of deeds' office of Milwaukee county a salaried office."

The contention is that the title of the act restricts it, and makes it operate within Milwaukee county only, and therefore that it is a local law, and that it embraces more than one subject not expressed in the title. The title of an act is not

always a sure test as to whether it is local or general. The constitutional provision above quoted was copied literally from a section of the New York constitution, and in construing that section it was held in that state at an early day that "the character of an act is to be determined by its provisions, and not by its title; and general provisions are not rendered void by reason of their being contained in the same act with other provisions of merely local application, though the title of the act refers to the latter provisions only." *People v. McCann,* 16 N. Y. 58. That decision has frequently been followed and sanctioned in that state. *Williams v. People,* 24 N. Y. 406, 407; *People v. Sup'rs of Chautauqua Co.* 43 N. Y. 13; *People v. O'Brien,* 111 N. Y. 59, 18 N. E. 692; *Ferguson v. Ross,* 126 N. Y. 463, 27 N. E. 954. In this last case it was said by the court to be "well settled that a general provision inserted in an act containing local provisions is valid, whether the subject is expressed in the title or not, as general acts require an enacting clause only." In *People v. O'Brien, supra,* it was said by the court:

"The character of a statute is to be determined by its provisions, and not by its title; but when its language is ambiguous and doubtful, resort may be had to its title, and the occasion of its enactment, to explain an ambiguity in its terms."

The body of the act provides:

"In all counties in this state having, by the last census, a population of one hundred and fifty thousand people or upwards, the register of deeds shall receive in lieu of all fees a salary," etc.

The contention is that Milwaukee was the only county in the state having the requisite population to which it could apply at the time of the enactment. But it is a general rule of construction that statutes are not to be construed so as to operate *retrospectively,* unless the intention of the legislature that they should so operate is unmistakable. *Seamans v. Carter,* 15 Wis. 548; *Vanderpool v. L. & M. R. Co.* 44 Wis. 652,

663; *Boorman v. Juneau Co.* 76 Wis. 554, 45 N. W. 675; *State ex rel. Davis v. Pors,* 107 Wis. 427, 83 N. W. 706. The act in question was not to go into effect at all until fifteen months after its passage. When it did go into effect it must be construed to apply to and embrace within its operation any and all counties answering the requirement. It is held in Pennsylvania that "there can be no proper classification of cities or counties, except by population." *Comm. v. Patton,* 88 Pa. St. 258, 260; *Wagner v. Milwaukee Co.* 112 Wis. 606, 607, 88 N. W. 577. Besides, it is well settled that, where a statute is capable of two different constructions, one of which is repugnant to the constitution and the other of which will support its validity, the latter must be preferred. *Att'y Gen. v. Eau Claire,* 37 Wis. 400; *Bound v. Wis. Cent. R. Co.* 45 Wis. 543; *Palms v. Shawano Co.* 61 Wis. 211, 21 N. W. 77; *Johnson v. Milwaukee,* 88 Wis. 383, 60 N. W. 270. The section of the constitution quoted is, by its terms, restricted to a "private or local bill." See *Lawton v. Waite,* 103 Wis. 244, 79 N. W. 321; *Milwaukee Co. v. Isenring,* 109 Wis. 18, 19, 85 N. W. 131. We must hold that the body of the act is general in its application.

2. Upon the assumption that the act is a "local bill," within the meaning of the section of the constitution quoted, counsel contend that the body of the act provides a radical change of system from fees to fixed salaries, and creates nine new offices and salaries therefor, payable entirely out of the county treasury, irrespective of the receipts of the office, "and without any intimation whatever in the title that such offices are being created." But this court has recently held:

"The constitution does not require the title of a private or local legislative act to go further than to express the subject covered by the body of the law. It leaves the method of expressing such subject to legislative discretion within all reasonable boundaries. The statement of a primary purpose in general terms, in a constitutional sense, reasonably includes

all the means designed to facilitate the accomplishment thereof." *Diana Shooting Club v. Lamoreux,* 114 Wis. 44, 89 N. W. 881.

Assuming the act in question to be a "local bill," within the meaning of the constitutional provision quoted, still it states the primary purpose or object of the act. It was to make the "office" of the register of deeds in Milwaukee county "a salaried office." That suggested that the compensation of all persons employed in the office should be paid a salary or fixed compensation in lieu of all fees. That was a radical change from the system which had prevailed prior to 1897. So, whether the act is considered general, by reason of the body of the act, or local, by reason of the title of the act, still, if not invalid by reason of other objections hereinafter considered, it covered the plaintiff's services during his first term of office.

3. This court has held "that the whole subject of the compensation of register of deeds was revised and covered by the revision of 1898, which went into effect September 1, 1898." *Dane Co. v. Reindahl,* 104 Wis. 302, 80 N. W. 438. Such revision expressly provided that sec. 764, above mentioned, should "not apply to counties" having a population of 150,000 or more, as shown by the last census; but that in all counties containing such population "the register of deeds whose term of office begins next after the taking of any census which shall show such number of inhabitants to be in any such county, shall receive, in lieu of all fees, a salary," etc., to be paid by the county treasurer, monthly or quarterly, as provided. Sec. 764*a,* Stats. 1898. The same section provides that "the register of deeds in every such county shall, quarterly, pay to the county treasurer all the fees and emoluments of every kind and nature received by him as register," etc. Id. That is substantially the same as sec. 2, ch. 169, Laws of 1895. No one has questioned the validity of sec. 764*a* as it appears in the revision of 1898. That it embraces

marriages, births, and deaths, and covers the plaintiff's second term of office, is too plain for argument. The same is true of sec. 2, ch. 169, Laws of 1895, as to his first term of office.

4. It is contended that ch. 169, Laws of 1895, violates the section of the constitution which declares that "the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable." Sec. 23, art. IV, Const. We perceive no good ground for such contention. It did not attempt to change the compensation of any officer during his term of office, as in a case cited by counsel. *Rooney v. Milwaukee Co. Sup'rs,* 40 Wis. 23. The register's office was administered the same as before. The register was elected the same as before. The deputy register and entry or receipting clerk provided for in the act, and all other employees, were to be appointed by the register, with the reserved right in the county board of confirming the deputy register. The register was made responsible for the conduct of all his subordinates by being required to give an additional bond of $25,000, "conditioned for the faithful accounting for and paying over of all money which may come into his hands as such officer, and for the faithful discharge of the duties of his said office." Sec. 3, ch. 169, Laws of 1895. This was because the fees, under the act, belonged to the county, whereas before the act they belonged to the register, who would, of course, look out for and care for his own. The act in no way attempts to change or interfere with the existing system of county government.

5. It is claimed that the act in question is repugnant to the section of the constitution which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." Sec. 1, art. VIII, Const. It is also claimed to be repugnant to the provision of the constitution which prohibits the enactment of "any special or private laws . . . for assessment or col-

lection of taxes." Subd. 6, sec. 31, art. IV, Const. The act made no attempt to interfere with the levy of taxes, nor with the rule of taxation, nor with the assessment or collection thereof. The fees to be exacted by the office remained the same as prescribed by sec. 764. The argument is that under the fee system the register was at liberty to waive his fees, and do the work for nothing, but now every citizen having services performed must pay the fee, and hence it is in effect a tax. That section declared then that "every register of deeds *shall* receive the following fees." The language is the same now. He was at liberty to give away his fees then. Under the act he had a salary in lieu of fees, and hence was accountable for the amount of the fees. In the one case he lost the fee; in the other he must account for the fee. In neither case were the patrons of the office taxed, but merely paid or failed to pay what the law required that they should pay for services rendered. In the present case the fees received and paid by the county greatly exceeded the salaries paid by the county. Had the salaries paid exceeded the amount of fees received, then, of course, the excess would necessarily have been paid out of the county treasury, and would have been supplied by taxation. But even in that event, the enactment being a general law, as shown by the body of the act, as mentioned, there is no force to the further contention that it invades the constitutional prohibition against the levy of a tax by special act. We must hold that ch. 169, Laws of 1895, was a valid enactment.

By the Court.—The order of the circuit court is affirmed.

VOELKEL, Appellant, vs. THE SUPREME TENT OF THE KNIGHTS OF THE MACCABEES OF THE WORLD, Respondent.

November 29, 1902—January 13, 1903.

Life insurance: Benefit associations: Suicide: Waiver: Admissions against interest: Evidence.

1. The rules of a mutual benefit association provided that the local tent was the agent of its members in collecting dues and assessments, and that the supreme tent should not be liable for any negligence, or bound by any illegal action or irregularity, of such local tent. The rules further provided that, in case of suicide, the association should be liable only to the amount of assessments paid in. Four days after the death of an insured by suicide, the collector of a local tent accepted of the beneficiary the assessments due at the date of insured's death. *Held*, that if such reception of the dues was irregular, it was an error of the beneficiary's own agent, of which she could not take advantage.
2. Where a mutual benefit association was liable for some amount, whether the insured committed suicide or not, the fact that the association requested proofs of death, which were furnished, and the beneficiary, after her claim had been rejected because of suicide, prosecuted at some expense an appeal before the appellate tribunal of the association, does not operate as a waiver.
3. Statements by a beneficiary in the proofs of death that the cause of insured's death was suicide are admissions against interest, and establish *prima facie* the fact of suicide.
4. In an action on a mutual benefit certificate the evidence examined, and *held* to support a finding that the cause of insured's death was suicide.

WINSLOW and DODGE, JJ., dissent.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

Action on a policy of life insurance issued by defendant on the life of Joseph Dempke, payable to the plaintiff, his wife. The assured died February 8, 1900. Plaintiff has

since married. The complaint is in the usual form. The defense was that the deceased committed suicide contrary to the terms of the policy and application. Section 173 of defendant's rules declares that no benefit shall be paid "when death was the result of suicide within five years after admission." If death by suicide occurs within said time, all assessments paid to the supreme tent by such member shall be paid back to the beneficiary named in the certificate in full for the amount that can be claimed in any case. Defendant tendered judgment for $168.58, being the amount of assessments paid, with interest, and for costs. It was a conceded fact in the case that Dempke came to his death by a pistol wound in the head. The rules of the defendant required plaintiff to present proofs of death on blanks furnished by it, showing, among other things, the cause of death. In compliance therewith, plaintiff furnished said proofs, in which it was stated three times that the cause of death was suicide by shooting. The only question litigated on the trial respecting the cause of death was whether the pistol was fired intentionally or accidentally. Some question as to waiver by defendant was presented, which will be noted in the opinion. After hearing all the proofs, the trial court directed a verdict for defendant on both issues. A new trial was denied, and judgment entered for plaintiff for the amount of assessments paid, interest, and costs to time of tender of judgment, from which she has taken this appeal

For the appellant there was a brief by *Nath. Pereles & Sons,* and oral argument by *C. F. Hunter.*

For the respondent there was a brief by *Quarles, Spence & Quarles,* attorneys, and *George Lines,* of counsel, and oral argument by *Mr Lines.*

BARDEEN, J. 1. As we read and interpret defendant's rules, if the death of the insured occurred by suicide within five years after his admission to the order his beneficiary

would only be entitled to the assessments paid in. On February 12, 1900, four days after the insured's death, the plaintiff paid the record keeper of the local tent $2.25 for an assessment due on February 1st, and thereafter the said record keeper asked plaintiff for proofs of death, which she furnished at the expense of six or eight dollars. After such proofs were furnished, her claim for the full amount under the certificate was rejected because of suicide by insured, and she was thereafter notified that she might appear before the appellate tribunal of the order, and show cause why she should receive any more than had been paid for assessments. This she did, but the court refused to allow her to show the amount of such expense. Upon these facts, the plaintiff claims a waiver. As to the question of receiving the money after death of insured, sections 233 and 234 of defendant's rules provide that the subordinate tent is the agent of its members in collecting and transmitting dues and assessments, and that the supreme tent should not be liable for any negligence, or bound by any illegal action or irregularity, of such subordinate tent. Under the facts stated and the rules noted, the reception of the money by the collector, if irregular, was an error of the plaintiff's own agent, which she cannot now take advantage of.

Under defendant's laws, it was responsible in some amount, whether the insured committed suicide or not. It had a right to demand proofs of death in either case. No liability arose until such proofs were furnished. The fact that plaintiff furnished such proofs, and prosecuted an appeal before the appellate tribunal at some expense, did not operate as a waiver, as such procedure and the expense thus incurred was in pursuance of her attempt to establish her claim under the laws of the order. The defendant was absolutely entitled to proofs of death under its rules. The pursuit of her rights before the appellate tribunal of the order was purely voluntary, and not in any way induced by the defendant. No elements of waiver

were shown, and the trial court rightly denied plaintiff any relief on that ground.

2. It was a conceded fact that Dempke came to his death by a pistol-shot wound in the head, and that such wound was occasioned through the active agency of deceased. In complying with defendant's rules in relation to proofs of death, the plaintiff asserted in her own affidavit, in the certificate of the coroner, and again in the certificate of the lodge officers, that the cause of Dempke's death was suicide by shooting. These statements were admissions against interest, and established *prima facie* the fact of suicide by the insured. *Hart v. Fraternal Alliance,* 108 Wis. 490, 494, 84 N. W. 851, and cases cited. Such proofs being produced by the plaintiff, and showing death from one of the causes excepted in the policy, was an absolute bar to her recovery, unless it was shown by other evidence that the shot which caused Dempke's death was not fired by him with intent to take his life. Has such evidence been produced? The following facts were established: Deceased was a man of quiet, reserved disposition, with a tendency to melancholy and nervousness. About two years before his death he fell downstairs, receiving serious injuries, causing hemorrhage of the stomach, which trouble continued, in a degree, to the time of his death. He was confined to his house for some time, and was never the same man afterwards. A few weeks before his death he struck his head against an iron ball on a machine he was using, and ever since he was, as plaintiff expressed it, "queer." On February 7, 1900,—the day before his death,—he fell, striking his left hand upon a tack, sustaining a slight injury. He went to a doctor in a state of considerable excitement, expressing a fear of blood poisoning. The doctor dressed his hand, and sought to remove the apprehension of danger by assuring him it would probably be all right. He went home pale and excited, and again expressed to plaintiff fear of blood poisoning. During the night he was restless and sleep-

less, and had plaintiff dress his hand repeatedly. The next day he arose at his usual time, but did not go to work. He ate but little breakfast, and then listened to his wife read a newspaper. About half past nine or ten o'clock, the plaintiff, being engaged in her household work, left the house to get a pail of water, leaving plaintiff sitting on a couch in the dining room. She returned in about two minutes, and found deceased sitting on the floor in the corner of his bedroom, with his back against the wall, his legs outstretched and spread apart, the revolver lying on the floor between his thighs, the muzzle pointing away from him, and his right hand either grasping or covering it. The post-mortem examination showed the bullet had entered Dempke's head about one and one half inches back and one inch above the right eye, passing through the brain in a practically horizontal course, and lodged on the other side of his head. No powder marks were observed either by the doctor, who came soon after the shooting, or by the plaintiff, and it appears that no special examination was made. Dempke's family relations were pleasant, and he was a saving and industrious workman, and fairly prosperous for a man in his station. These are the material facts disclosed by the undisputed testimony. It is not questioned that his death was caused by a bullet from the revolver found on the floor between his legs. The course of the bullet makes it certain that the revolver, when discharged, must have been pointing toward the right temple, and in line with a plane passing through his brain, and irresistibly suggests that it must have been held in deceased's own hand when fired,—a suggestion which is strongly corroborated by the fact that, when found, his right hand either grasped or rested upon the revolver as it laid upon the floor. The position of the body, partially leaning against the wall, is also significant. To us it does not seem that there is a single fact in the case that suggests any other cause of death than suicide. The proofs of death, with the accompanying

circumstances referred to, make the case quite as strong against the plaintiff as in *Agen v. Metropolitan L. Ins. Co.* 105 Wis. 217, 80 N. W. 1020, and *Hart v. Fraternal Alliance,* 108 Wis. 490, 84 N. W. 851, and justify the trial court in its ruling.

By the Court.—The judgment is affirmed.

WINSLOW and DODGE, JJ., dissent.

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ELLISON and others, Appellants, vs. STRAW and others, Respondents.

November 29, 1902—January 13, 1903.

Life insurance: Debtor and creditor: Policy for benefit of married woman: Interest of beneficiary: Exemptions: Statutes: Policy on husband's life: Vested and contingent interests: Children: Married women: Separate estate: Disability of married woman to assign rights as beneficiary under policy on life of another.

1. By sec. 2347, Stats. 1898, insurance on the life of any person for the benefit of a married woman cannot be reached by her creditors or those of any other person.
2. Ch. 376, Laws of 1891, now a part of sec. 2347, Stats. 1898, as regards married women, and, contingently, their children, changes the rule that a mere beneficiary in a policy of life insurance has no interest therein during the life of the assured which he cannot take away by naming some other person as beneficiary or disposing of the policy fund by will. *Strike v. Wis. O. F. Mut. L. Ins. Co.*, 95 Wis. 583, 70 N. W. 819, so far as to the contrary, is overruled.
3. A policy of life insurance upon the life of any person payable to a married woman, with no provision therein as to a beneficiary in case she shall not survive to take, belongs to her children if she has any surviving her, with the same freedom from interference by creditors or others as in case of the first beneficiary.
4. By sec. 2347, Stats. 1898, as it now stands:

   (a) A married woman may, without her husband's consent, take out a policy of insurance on his life for her own benefit, or for such benefit and that of her children.

   (b) A policy of insurance taken out upon any life for the

benefit of a married woman, nothing being said as to who shall be the beneficiary in case she shall not survive to take at the maturity of the policy, vests a contingent right in the insurance fund in her, which is her sole and separate property, free from control or disposition by her husband or the person taking out the insurance, and beyond the reach of the creditors of any one.

(c) Such a policy vests in the children of the married woman a contingent right to the insurance, safe from disturbance by her or any other person, or by such children, prior to the maturity of the policy and the fund reaching their hands.

(d) The right in the children does not contemplate a joint enjoyment of the insurance fund by them and their mother. It is a mere right to the fund in case the mother does not survive to receive the same, there being no other disposition thereof provided for in the policy.

(e) A policy of insurance of the character mentioned, with the added element providing for a disposition of the insurance fund upon the contingency of the wife not surviving to receive the same, vests in the wife the same right in all respects as if such secondary disposition were not made.

(f) A married woman is under an absolute disability to part with her beneficiary interest by assignment. Her husband or person paying the premium is under a like disability to disturb her rights by assigning the policy or changing the beneficiary therein, or disposing of the policy by will, and creditors generally are as completely debarred from resorting to the policy for the payment of their claims.

(g) The policy and its proceeds are free from all interferences save lapses and forfeitures mentioned, militating against the proceeds thereof, upon the time arriving and circumstances occurring named as conditions precedent to the maturity of the contract in her favor, vesting in her with the right to personal possession of the fund as her separate property, leaving the same then subject to her obligations the same as any other portion of her estate.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Creditors' action to reach two insurance policies owned by defendants *Alonzo W. Straw* and *Amelia E. Straw.* The findings of fact sufficiently show the issues made by the pleadings. Here is a brief statement thereof:

Plaintiffs are and were, during all the time material to this case, copartners doing business as John B. Ellison & Sons. The defendant *Northwestern Mutual Life Insurance Company* is a duly organized Wisconsin life insurance corporation. Defendant *Amelia E. Straw* is the wife of defendant *Alonzo W. Straw*. *Carrie A. McCoy* is the daughter and only child of *Alonzo W. Straw* and wife, and *William A. McCoy* is her husband. December 19, 1900, plaintiffs recovered and caused to be duly docketed in the superior court of Milwaukee county, Wisconsin, a judgment against defendants *Straw* for $11,951.55. Before the commencement of this action execution was duly issued for the enforcement of such judgment, and was returned in due form wholly unsatisfied. Thereafter, and before the commencement of this action, in proceedings against the defendant insurance company as garnishee of the *Straws*, plaintiffs recovered, to be applied on such judgment, $3,802.47. The amount unpaid on the judgment is $8,663.24. The *Straws* do not own any property in this state subject to execution. August 7, 1877, defendant insurance company issued to defendant *Alonzo W. Straw* its policy of insurance No. 93,659, agreeing, in consideration of $102.52 then paid, and payment of a like sum August 7th each year thereafter during the assured's life, to insure him for the benefit of his wife for $6,000 for two years, and $4,000 thereafter, payment to be made to her after his death, within sixty days of due notice and proof thereof, or to her executors, administrators or assigns in case she survived her husband, otherwise to his administrators or assigns. The policy contained a provision to the effect that, in case of default in any annual premium after the payment of three premiums, there would be issued to the assured a paid-up, nonparticipating policy for an equitable sum equal to the full amount of payments made in excess of the first two premiums, conditioned upon the policy being then free

from any claims by the company or indebtedness of the assured to it, and upon a written application being made therefor and the policy and all claims under it being surrendered to the company within six months after the default. September 19, 1885, said company issued to *Alonzo W. Straw* its policy of life insurance No. 137,000 for the benefit of his wife, conditioned upon her surviving him, otherwise for the benefit of his administrators or assigns. On account of and in lieu of the first policy *Alonzo W. Straw* holds a full-paid, nonparticipating life policy for $2,153, and one in lieu of the second policy mentioned of $6,660. No obligation rests upon defendant insurance company to pay any sum upon either of said policies during the life of the assured, but in accordance with the uniform custom of the corporation, it will pay as a surrender value for the first policy, $1,145.96, and for the second policy $3,530.30. Such surrender value, as to each policy, will increase as the expectancy of life of the assured decreases. The policies are now held by the assured free from any assignment or incumbrance or claim, otherwise than in this action.

Upon such facts the court decided as a matter of law that the policies of insurance could not be subjected to the payment of plaintiffs' judgment, and ordered the complaint dismissed with costs. Judgment was entered accordingly.

William Kaumheimer, for the appellants.

For the respondents there was a brief by *Turner, Pease & Turner,* and oral argument by *W. J. Turner.*

MARSHALL, J. This appeal turns on the construction of sec. 2347, Stats. 1898. As it is necessary to view the statute as a whole in order to reach a correct conclusion, especially leaving out of view authorities elsewhere, we will embody the same as an entirety in this opinion:

"Any married woman may, in her own name or in the name of a third person as her trustee, with his assent, cause to be insured for her sole use the life of her husband, son or

other person for any definite period or for the natural life of such person; and any person, whether her husband or not, effecting any insurance on his own life or on the life of another may cause the same to be made payable or assign the policy to a married woman or to any person in trust for her or her benefit; and every such policy, when expressed to be for the benefit of or assigned or made payable to any married woman or any such trustee, shall be the sole and separate property of such married woman and shall inure to her separate use and benefit and that of her children, and in case of her surviving the period or term of such policy the amount of the insurance shall be payable to her or her trustee for her own use and benefit, free from the control, disposition or claims of her husband and of the person effecting or assigning such insurance and from the claims of their respective representatives and creditors. But if the annual premium on any such policy shall exceed the sum of one hundred and fifty dollars and is paid by any person with intent to defraud his creditors an amount equal to the premiums so paid in excess of said sum, with interest thereon, shall inure to the benefit of such creditors, subject, however, to the statute of limitations. The amount of any such insurance may be made payable, in case of the death of such married woman before the period at which it becomes due, to her children or to their guardian for their use, if under age, or to any other person as shall be provided in the policy. In such case the receipt of such married woman or of such children, or of their guardian if minors, shall discharge the insurance corporation from all further liability therefor. The provisions of this section shall apply to all insurance on lives effected before the passage of these statutes."

Does that language disclose a legislative purpose to guard the insurance upon the life of a person, designed, in the manner indicated in the statute, for a married woman, absolutely against the claims of her creditors as well as his, and to so entrench the same, that, if kept alive till the policy matures, in the contingency that she then survive, the insurance fund will reach her hands without interference from anybody? That is the broad question involved, though of course here only that particular branch thereof is required to be decided

relating to the right of a married woman's creditors to appropriate her insurance before the maturity of the policy against her will. Its solution in the affirmative will sustain the judgment.

That the language of the statute is not so entirely free from ambiguity as not to admit of judicial construction, we think is apparent without argument. So we will pass the preliminary question in that regard and examine it in the light of those familiar tests to be applied to written laws for the purpose of judicially discovering the idea attempted to be voiced therein by the lawmaking power,—those principles which require us to "look at the whole and every part of the statute, and the apparent intent derived from the whole, to the subject-matter, to the effect and consequences, to the reason and spirit of the law, and thus to ascertain the true meaning of the legislature, though the meaning so ascertained conflict with the literal sense of the words; the sole object being to discover and give effect to the intention of its framers." *Ogden v. Glidden,* 9 Wis. 46; *Harrington v. Smith,* 28 Wis. 43; *Hartford v. N. P. R. Co.* 91 Wis. 374, 64 N. W. 1033. Bearing in mind that judicial authority to declare the law by rules of construction is limited by this principle, the legislative purpose, however obvious, cannot, by mere judicial construction, be regarded as efficiently carried into the statute unless it can be read out of the language thereof without looking beyond its reasonable scope. But, as said in *Salmon v. Duncombe,* 11 L. R. App. Cas. 627, the intention of the legislature being clear, nothing short of "absolute intractability of the language used" to express it will prevent its being carried out by the courts.

It is significant that the reviser's notes which were before the legislature of 1878, when sec. 2347 was originally adopted, show that the particular wording thereof was adopted for the purpose of rendering life insurance, to a specified amount, "exempt from debts"; not from the debts

of any particular person, it will be noted, but generally, "from debts." The words, "be the sole and separate property of such married woman," and "free from the control or disposition of her husband," etc., were added to the statute by ch. 376, Laws of 1891. Prior thereto, notwithstanding studied efforts of lawmakers, by statutory restrictions, to guard life insurance made payable to a married woman, so that she would enjoy the same in case of her surviving till the maturity of the policy, to take according to the terms of the contract, the door was left wide open, under the judicial policy of this state, for the person taking out the policy and paying the premiums, she being a mere beneficiary, to destroy her rights in that regard at any time at his pleasure, by designating some other beneficiary to take in her place, or by disposing of the insurance by will. *Clark v. Durand,* 12 Wis. 223; *Kerman v. Howard,* 23 Wis. 108; *Foster v. Gile,* 50 Wis. 608, 7 N. W. 555, 8 N. W. 217. The statement found in *Strike v. Wisconsin O. F. M. L. Ins. Co.* 95 Wis. 583, 589, 70 N. W. 819, and unguardedly referred to subsequently in *Alvord v. Luckenbach,* 106 Wis. 537, 82 N. W. 535; *Stoll v. Mut. B. L. Ins. Co.* 115 Wis. 558, 92 N. W. 277, and perhaps other cases, that the amendment to sec. 2347, of 1891, "was not intended to change the rule of *Foster v. Gile,*" as regards the power of the owner of a life insurance policy to change the beneficiary therein named without such beneficiary's consent, is clearly wrong respecting married women and their children, where there is no person named as beneficiary to take in case the mother does not survive to do so. To the extent suggested, a purpose is clearly manifested by the amendment of 1891 to change the judicial rule which existed from an early day up to 1891, that the mere beneficiary named in a policy of insurance had no rights whatever which the assured was bound to respect, and it was overlooked in *Strike v. Insurance Co.,* and not sufficiently brought to our attention to lead to the necessary cor-

rection till *Rawson v. Milwaukee M. L. Ins. Co.* 115 Wis. 641, 92 N. W. 378. It must be understood now that the legislation of 1891, as regards the section of the statute under discussion, worked a radical change in the previous rule, as to the control, by assured persons, of policies upon their lives in favor of married women, or contingently for the benefit of the children of such women. When a policy of insurance upon the life of a person is expressly made payable to a married woman or for her benefit, with no provision as to where the insurance fund shall go in the event of her not surviving to take at the maturity of the policy, by force of the statute it goes to her children with the same freedom from interference by creditors or acts of the assured person as in case of the first beneficiary.

The statute, it will be seen, leaves the assured free to make any person he may see fit his beneficiary, after the married woman named as primary beneficiary, by a stipulation in the policy, in these words:

"The amount of any such insurance may be made payable, in case of the death of such married woman before the period at which it becomes due, to her children or to their guardian for their use, if under age, or to any other person as shall be provided in the policy."

These purposes, we take it, are clearly found in the statute: (1) A married woman may, without her husband's consent, take out a policy of insurance on his life for her own benefit or for such benefit and that of her children. (2) A policy of insurance taken out by a married man upon his own life for the benefit of his wife, nothing being said as to who shall be the beneficiary in case she shall not survive to take at the maturity of the policy, vests a contingent right in the insurance fund in her, which right is her sole and separate property, free from the control or disposition of the husband or person taking out the insurance, and beyond the reach of the creditors of the person whose life is insured, the

same as if the policy were taken out by herself. (3) Such a policy vests in her children a contingent right to the insurance, safe from disturbance by her or the person whose life is insured, or by such children prior to the maturity of the policy and the fund reaching their hands. "It shall inure to her separate use and benefit, and that of her children," the statute says, thereby reading into the contract of insurance a right in such children as free from interference as the right in the primary beneficiary, unless the policy, by its terms, otherwise provides. Evidently, that right in the children does not contemplate a joint enjoyment of the fund in any event by the mother and her children. It is a mere right to take if the mother does not survive to do so. This language makes that plain:

"In case of her surviving the period or term of such policy, the amount of the insurance shall be payable to her or her trustee for her own use and benefit," etc.

(4) A policy of insurance of the character mentioned, with the added element providing expressly for disposition of the insurance fund upon the contingency of the wife not surviving till the maturity of the policy, vests in the wife the same right in all respects as before indicated. (5) The policy being so worded that the children do not, by force of law, obtain a vested right to the insurance contingent upon their surviving till the maturity thereof, if the mother's interest therein is assignable, it is also assignable to the extent of her interest when her children do, by force of the statute, possess the contingent vested interest before indicated. That is, if it is consistent with the statute to hold that the right secured to a married woman under the statute is assignable by her in any case, it is assignable in all. The importance of this will be seen when we compare our statute with that of New York and the decisions under the latter statute, in view of the conceded fact that if, under the law, a married woman's right to the insurance made for her benefit is not assignable, it can-

not be reached by her creditors. (6) Lastly, the whole scope of the statute shows that the purpose thereof was that a policy of insurance made upon the life of a person for the benefit of a married woman, the policy being kept in force, shall be to all intents and purposes her property, free from all interferences, save, of course, forfeitures under the conditions of the policy, preventing, in case she survives the insurance period, the insurance fund being, using the terms of the statute, "payable to her or her trustee for her own use and benefit,"—that is, payable to her in the literal sense of the words used. The words which follow the quoted language, "free from the control, disposition or claims of her husband and of the person effecting or assigning such insurance and from the claims of their respective representatives and creditors," are not used in a restrictive sense, but indicate, not only that the insurance fund shall be preserved so that it may reach her hands, but that it shall then be free from all liability to appropriation contrary to her wishes for the payment of the debts or claims of her husband or of the person effecting or assigning the insurance, and from the claims of their respective representatives and creditors; that it shall be her absolute property at that time, in personal possession, subject thereafter, of course, to claims upon her the same as any other property she may possess.

From what has been said it would seem that the dominant purpose of the whole course of legislation resulting in sec. 2347 as we now find it, has been to provide, not for married women, but for widows, and that the full scope thereof cannot be effected other than by holding a married woman powerless to in any manner, directly or indirectly, assign insurance made for her benefit; that she is as powerless in that regard as the person taking out the insurance for her benefit; that the statute, while giving to her upon the one hand a right to take out insurance upon her husband's life without his consent, upon the other, when insurance has been made for her

benefit, whether by her own act or the act of her husband, or of any other person, it creates a disability as to her parting with the insurance; it preserves the insurance to the end that, in case of her surviving the insurance period, it may then be payable to her for her own use and benefit. It is well known that the original purpose of the statute was to safeguard married women and their children against inability to provide for their wants in the event of widowhood and infancy. That being the case, it would be absurd, it would seem, to hold that the legislature failed in so important a particular as to leave a married woman's beneficiary right under a policy of insurance liable to be taken from her *in invitum* by creditors or otherwise. In view of the mischief which it is supposed the statute was intended to remedy, we would be precluded from holding, under the most familiar rules of judicial construction, that there was an utter failure to voice such purpose in the statute, if it can be reasonably avoided consistent with the language of the law, viewing the same in the broadest sense the language will permit. That, within such broad field, there can be read out of the language of the statute nonassignability of a married woman's right in a policy of insurance made for her benefit, exemption of it from claims of creditors generally, absolute disability on her part, directly or indirectly, to defeat the wisdom of the law, it seems has already been demonstrated. But we might safely rely, without the labor of carefully analyzing such language in all its aspects, upon a long line of decisions in New York under a similar statute, reaching back for nearly half a century, the statute itself being upwards of sixty years old. Our statute, in the main, originated here with chapter 158, Laws of 1851. That, in most of its essential particulars—all of them, it would seem, as regards the questions here for decision—was adopted from the statute of New York, chapter 80, Laws of that state for 1840. The latter statute related only to insurance taken out by a married woman upon

the life of her husband without his consent. Our statute was a substantial copy thereof, except that it gave a married woman the same right in insurance taken out for her benefit by her husband or any one else, as in insurance taken out by her upon her husband's life. Such features are all preserved in the present statute, and in those respects where, as in *Foster v. Gile,* and other cases to which we have referred, the judicial policy of this state was at one time contrary to that of New York as regards married women beneficiaries, harmony has been wrought between the two by the law of 1891, creating a disability on the part of the husband of a married woman who shall have taken out insurance for the benefit of his wife, from subsequently disposing of the policy or in any way changing the beneficiary so as to defeat her rights, at least without her consent.

On the question of the assignability by a married woman of her mere beneficiary right in insurance policies under the statutory policy under discussion, the decisions of New York, under its act of 1840, apply, in our judgment, fully to our statute. The subject was first considered there in *Eadie v. Slimmon,* 26 N. Y. 9, decided in 1862. The facts were that a married woman was induced to assign her right in a policy of insurance taken out upon her husband's life. Subsequently the husband died. The suit was between her and her assignee as regards the true ownership of the insurance fund. The decision was in her favor upon the ground that the policy of the statute disabled her from trafficking in any way with her insurance; that under it a policy of insurance made for her benefit is to all intents and purposes her property, and though it is a chose in action in the general sense, it is not one which she can sell or which can be taken from her by her husband or anybody else. This language was used:

"We think the intent of the statute was to make these policies a security to the family of any married man and a provision for their use and benefit, and that this intent would

be defeated if they were held to be assignable by the wife like ordinary choses in action belonging to her in her own right as her separate property."

Upon a reargument on that question, Mr. Justice DENIO, delivering the opinion of the court, said of the statute:

"It is special and peculiar, and looks to a provision for a state of widowhood, and it would be a violation of the spirit of the provision to hold that a wife, insured under this act, could sell or traffic with her policy as though it were realized personal property or an ordinary security for money."

The same subject was treated at considerable length in *Barry v. Equitable L. Ass. Soc.* 59 N. Y. 587, and the previous decision was sustained, both under the rule of *stare decisis* and because the court, upon an appeal to reconsider the matter, considered such decision correct. This language was used in summing up the matter:

The act was "not for the sake of the woman while a wife, but when a widow; not that she might sell or assign the contingency which was created by the policy, but that it should be kept for her until, by the death of her husband, she surviving, it became realized personal property. . . . The act confers a special privilege and is in the nature of a law exempting goods from execution. The privilege is given in view of an especial legislative intention and policy, which would be subverted if the contingent interests arising under it could be treated and dealt with as the separate property of a married woman, to be disposed of or affected by her subsequent contracts."

To the same effect are *Wilson v. Lawrence,* 76 N. Y. 585; *Whitehead v. New York L. Ins. Co.* 102 N. Y. 143, 6 N. E. 267; *Smillie v. Quinn,* 90 N. Y. 492; *Baron v. Brummer,* 100 N. Y. 372, 3 N. E. 474; *Brick v. Campbell,* 122 N. Y. 337, 25 N. E. 493; *Stokes v. Amerman,* 121 N. Y. 337, 24 N. E. 819. In *Baron v. Brummer,* as counsel for respondent suggests, the very question presented here was decided in favor of the exemption of a married woman's beneficiary interest in a policy of insurance, from the claims of her credit-

ors, basing the same upon the policy of the statute, as before indicated. That case, as well as others we have cited, was decided after the New York statutes were so changed as to remove the disability of a married woman to assign such beneficiary rights. It was held, notwithstanding such change, that the policy of the statute yet safeguarded her against hostile seizures of such rights; that such change merely gave her power to sell her beneficiary interests by conforming to the peculiar provisions of the law on the subject, but did not, by implication, carry with it the right of her creditors or anybody else, in any hostile way, to interfere with her contingent insurance interest. The reasoning of these cases seems sound. If the question were new, doubtless we should reach the same conclusion as we do by the aid thereof. Since our statute was borrowed from New York, notwithstanding that occurred before it had received judicial construction in the home state, the long line of decisions to which we have referred might well be regarded as controlling.

By the Court.—The judgment is affirmed.

CITIZENS' LOAN & TRUST COMPANY, Administrator, Appellant, vs. HOLMES, Respondent.
SAME, Respondent, vs. SAME, Appellant.

December 3, 1902—January 13, 1903.

Equity: Deed of gift: Mental capacity: Undue influence: Evidence: Immaterial error: Assets of decedent's estate.

1. In an action to set aside a deed of gift, the evidence (stated in the opinion) is *held* to sustain findings of mental capacity in the donor, although at the time of the gift the donor was suffering from paralysis, and died about two months later.
2. In such case the evidence is *held* to sustain findings of absence of undue influence exerted on the donor, although by direction

of the donor, assented to by the donee, the donee made suspiciously large payments for services to persons who became her witnesses, and, shortly after donor's death, the donee made large payments to the donor's heirs and took releases from them.

3. In an equitable action to set aside a deed of gift on the ground of want of mental capacity and undue influence, the admission of incompetent evidence in behalf of defendant is immaterial error, where findings favorable to her are supported by competent evidence.

4. A decedent, absent from home at a hotel, was taken sick and sent for defendant, to whom he executed a deed of gift of practically all his estate. Before defendant arrived, decedent gave a sum of money to the hotel keeper for safe keeping. The hotel keeper deposited it in a bank in defendant's name, and it was all drawn out by her under decedent's instructions, and used to pay expenses. *Held*, that no portion of that money belonged to decedent's estate, and defendant was not liable therefor to decedent's administrator.

APPEALS from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed in part.*

This action was commenced January 4, 1901, to set aside a deed of gift and order alleged to have been executed by the plaintiff's intestate December 7, 1899, to the defendant, of $166,258 in United States bonds and certificates of deposit then held for safe-keeping by John Johnston, cashier of the Wisconsin Marine & Fire Insurance Company Bank, at Milwaukee, on the ground that such deed of gift and order had been procured by the defendant by fraud and undue influence, and at a time when the deceased was mentally incompetent to do business. The defendant answered by way of admissions, denials, and counter allegations, and, among other things, alleged, in effect, that after the death of the said Charles James, January 31, 1900, and after the defendant came into the possession of the property mentioned, she gave to each of the several heirs at law of said deceased mentioned in the complaint large sums of money received by her from the deceased, and that each of them accepted the

same and executed to her a release and discharge of the defendant from any and all liability on account of her relationship to the deceased. The cause having been reached for trial, the plaintiff moved the court to have certain issues of fact submitted to a jury for determination, and the motion was granted; and the court thereupon ordered the following questions to be submitted to the jury, which was then impaneled and sworn:

First question: "Was the said Charles James, at the time of the executing of the alleged deed of gift, possessed of sufficient mental capacity to know and understand the business in which he was then engaged?" Second question: "Did the said Charles James execute the alleged deed of gift because of undue influence or coercion exercised by others, and which deprived him of his free will?"

Afterwards at the close of all the testimony the court withdrew the case from the jury, and answered the first question in the affirmative, and the second question in the negative; that is to say, the court found, in effect, that at the time of executing the deed of gift the said Charles James was possessed of sufficient mental capacity to know and understand the business in which he was then engaged, and that the said Charles James did not execute the alleged deed of gift because of undue influence or coercion exercised by others, and which deprived him of his free will.

The court also found, as matters of fact, in effect: (1) That the plaintiff is a corporation authorized to act as such administrator. (2) That the defendant, *Millicent Holmes,* resides in Mineral Point, Wisconsin, and is a grandniece of the deceased. (3) That Charles James was a citizen and resident of Milwaukee, and died in the city of Thomasville, Georgia, January 31, 1900, without leaving any last will and testament, unmarried, leaving no parents, brothers or sisters, or issue; his nearest relatives being nieces and nephews and grandnephews and grandnieces. (4) That July 11, 1900, letters of administration upon the estate of the de-

ceased were duly issued to the plaintiff; that the plaintiff thereupon, and before the commencement of this action, duly qualified and entered upon its duties as such administrator, and has continued as such ever since. (5) That December 7, 1899, the deceased was the owner of money, certificates of deposit, and United States bonds to the amount and value of $166,258. (6) That at no time during the life of the said Charles James, prior to and including December 7, 1899, was the said Charles James feeble in mind or unable to manage his affairs and property, but, on the contrary, down to and including December 7, 1899, and for at least three weeks thereafter, the said Charles James was of sound mind, and able to manage his affairs and property. (7) That down to December 2, 1899, the said Charles James was a man unusually vigorous, physically, for one of his age (he being of the age of eighty-eight years), and was a man of strong will. (8) That December 2, 1899, at a hotel in Thomasville, the said Charles James suffered a stroke of paralysis, which affected the left side of his body; that such stroke of paralysis in no manner whatever impaired the mental faculties of the said Charles James; that such sickness was the only sickness from which the said Charles James at that time suffered; and that January 31, 1900, he died, never having in the meantime recovered from said sickness. (9) That the said deceased had no relatives with him at the time he became sick as aforesaid. Realizing his position, he called upon Royal J. Miller, the proprietor of the hotel at which he was stopping, and directed him to send a telegram to the defendant, at Mineral Point, to come to him at once, and bring her brother, and at the same time delivered to the said Miller the currency which he had with him, amounting to the sum of about $700, to retain the same for safe-keeping, and directed the said Miller to send a telegram to John Johnston, cashier of the Wisconsin Marine & Fire Insurance Company Bank, to send the money that he had on deposit (about $2,600) by

New York draft, payable to the order of the defendant, and gave to the said Miller a receipt which he had from the said Johnston as custodian of his property, accompanying the delivery of the receipt to Miller with a statement that he wished to transfer all of the property described in the receipt to *Miss Millicent Holmes,* of Mineral Point, and with the request that he would see that the proper instrument or instruments conveying such property was prepared. The said receipt is as follows:

"Milwaukee, Nov. 3, 1899.

"Charles James, Esq., City—*Dear Sir:* I have this day received from you, for safe-keeping and the collection of interest thereon:

3% coupon bonds		$50,000
c/d Wis. M. & F. Ins. Co. Bank,	No. 110,840	29,258
do	No. 109,154	37,000
do	No. 109,058	50,000
		$166,258

"Yours, truly,

"JOHN JOHNSTON."

—That the said Miller had no acquaintance with the said defendant, and had never had communication with her; that the arrangements for the transfer of said property originated with the deceased, and he gave all of the directions above set forth without suggestion from any one, and as his free and voluntary act, uninfluenced by any person. (10) That pursuant to the request by telegram of the deceased, the defendant proceeded to Thomasville, arriving there on December 6, 1899; that the defendant did not know until her arrival at Thomasville as aforesaid of the intention of the deceased to give her the said property, but that, on the evening of her arrival there, the said deceased, without solicitation on the part of the defendant, or any other person in her behalf, stated that he intended to give her all of his property, and that he had arranged for transfer thereof to her. (11) That pursuant to the direction given to the said Miller by the deceased previous to the arrival of the defendant, and of direc-

tions personally given to Hope H. Alexander, an attorney of Thomasville, by the deceased and by the said Miller, the said Alexander did prepare for execution, and to transfer to the defendant the said property, the writing, Exhibit B, attached to the complaint in this action. (12) That December 7, 1899, the said Alexander, accompanied by the said Miller and one James L. Pringle, went to the room where the deceased then was, and exhibited to him the said contract, and read and explained the contents thereof to him, and he then and there stated to the said parties that the said paper expressed and carried out his intentions, and did freely and voluntarily, without solicitation from any one, and wholly of his own volition and with his own hand, execute said paper, with the intention of thereby giving and transferring to the defendant the property therein described, and the said paper, after being witnessed by the witnesses whose names appear thereon, in the presence of the donor, and acknowledged by the notary public also in his presence, and after the signature of the notary was properly attested by the certificate of the clerk of the court, was duly delivered to the said defendant, all with the knowledge, approval, consent, and by the direction of the said deceased. (13) That after the execution and delivery of the paper as aforesaid, the said Charles James did cause to be written upon the receipt of the said John Johnston direction to the said Johnston to deliver the property in said receipt described to the said defendant, and duly signed such order; that such order is in the words and figures following:

"Thomasville, Ga., December 7th, 1899.

"To John Johnston, Esq.,

"Milwaukee, Wis.

"*Dear Sir:* You will please pay over and deliver to *Miss Millicent Holmes,* of Mineral Point, Iowa county, Wisconsin, the United States interest-bearing bonds and coupons, together with the three (3) certificates of deposit, mentioned in the foregoing receipt signed by you, on demand by her.

And I further authorize and instruct you to issue or cause to be issued to her new certificates of deposit in her own name for the amounts named in the original certificate of deposit issued to me by the Wisconsin Marine & Fire Insurance Company Bank. I was stricken with paralysis, and had to do this.

"Very truly yours,
"CHARLES JAMES."

"Witnessed by
"Hope H. Alexander."

That thereafter, and by direction of the said Charles James so to do, the said defendant proceeded with said contract and order to the city of Milwaukee, presented the same to the said John Johnston, and on said 14th day of December, 1899, the said John Johnston did, pursuant to said contract and said order, deliver the property therein described to the said defendant, *Millicent Holmes;* that thereafter the said *Millicent Holmes* did return to the city of Thomasville, and remained with and cared for the said Charles James to the time of his death. (14) That after the death of the said Charles James the defendant did freely and voluntarily, without any obligation resting upon her so to do, give to the several persons named in the complaint as the only heirs at law of the deceased the sums of money following: William F. James, $10,000; Christina Holmes, $15,000; George A. James, $5,000,—and did set aside in the hands of John Johnston, trustee, the sum of $15,000 for the use of William B. James and his children; that each of said parties executed in writing acknowledgments of similar form and to the same effect as the instrument set forth in the answer; that in addition thereto the defendant did freely and voluntarily give to other relatives of the deceased, without any obligation resting upon her so to do, the sums of money as follows: Charles Edwin Holmes, $15,000; Ella M. Prisk, $5,000; George W. Holmes, $15,000; Henry Holmes, $15,000; Harry S. James, $5,000; George White, $1,000; Charles E. White,

$1,000; that each of the parties so receiving money acknowledged the receipt thereof, and that they had no claim upon the said Charles James or his estate; that none of the parties receiving such sums of money has ever returned the same, or offered to return the same or revoke the writings made by them; that there came into the hands of the defendant $642.14 belonging to the deceased, which is not included in the money given to her by the deed of gift heretofore referred to; and that said sum of $634 belongs to the estate of the said deceased, and the administrator thereof is entitled to have and recover the same from the defendant, less such costs as may be awarded to her in this action.

And as conclusions of law the court found, in effect, that by the instrument of conveyance, and by the order to the said John Johnston, and by the delivery of the property therein described to the defendant, the whole title and beneficial interest in the said property became vested in the defendant during the lifetime of the deceased, and became absolutely and unconditionally vested in the defendant, and she became the owner thereof; that by accepting the money delivered by the defendant to the heirs at law of the deceased, and executing the agreements and releases referred to, all the heirs of the deceased have acknowledged full satisfaction of any claim or demand or right they might otherwise have to any portion of the estate of the deceased, or of the property given by him to the defendant as aforesaid, and are estopped from making any claim or demand upon her, or any attack upon the title to the property so transferred to her; that the defendant is entitled to the judgment of the court dismissing the plaintiff's complaint, with her disbursements, and the plaintiff is entitled to judgment in its favor for $642.18 and interest from December 10, 1900,—and ordered judgment to be entered accordingly.

The plaintiff appeals from the whole of the judgment in favor of the defendant and against the plaintiff. The de-

fendant appeals from so much of the judgment as is in favor of the plaintiff and against the defendant for $739.12.

For the plaintiff there was a brief by *Nath. Pereles & Sons,* attorneys, and *G. D. Goff,* of counsel, and a supplemental brief signed by *Nath. Pereles & Sons,* and oral argument by *Mr. Goff.*

For the defendant there were briefs by *Turner, Pease & Turner,* and oral argument by *W. J. Turner.*

CASSODAY, C. J. It is claimed on the part of the plaintiff that at the time of executing the deed of gift and the order upon the cashier of the bank to deliver the bonds and certificates of deposit to the defendant, December 7, 1899, the deceased was mentally incompetent to comprehend the business in which he was then engaged. The trial court, after hearing all the evidence, found to the contrary; and the question is whether such finding is against the clear preponderance of the evidence. The evidence bearing upon that question was almost wholly from witnesses produced on the part of the defendant, who had known the deceased for many years, including the cashier of the bank with whom he had done business for many years. From the testimony of such witnesses, there can be no question but that the deceased, prior to his starting for Thomasville, Georgia, on or about November 4, 1899, was of sound mind and memory, and perfectly competent to transact any business. He had for many years been a resident of Milwaukee county, and by economy, thrift, and judicious investments, and the increase in the value of property, had accumulated a large fortune. At the time of going to Thomasville he was about eighty-eight years of age and had never been married, and had no relatives nearer than nephews and nieces. Prior to that time he occasionally gave property to some of his relatives, and had twice been to Europe, and given considerable property to some of his poor relatives there. For a man of his age, he was very active and vigorous,

and above the average in intelligence. He was straight and honest in his dealings, and had ideas and opinions of his own, which became deeply rooted and seldom changed. The cashier mentioned tried to get him to make a will, to avoid litigation, but he vigorously declined, and said there would be a fight if he did make a will, and that he had his own ideas; that "he had a scheme in his mind"; that "he would never make a will"; that "he was opposed to it"; that "it would only give the lawyers a chance." That was just before he started South, and when his health was not very good. About the same time, Dr. Walter Kempster, who had known him for several years, had a talk with the deceased, and describes him physically and mentally, and, among other things, testified:

"His mental condition and knowledge of his property at the time I last saw him was good,—in fact, as good as at any time of my acquaintance with him. . . . He was a man of clear ideas, rather incisive in his method of stating things, and, having made up his mind that he was right, he was pretty apt to stick to his opinion, unless sufficient evidence was brought forward to overthrow it completely."

Such was the mental condition of the deceased when he started for Thomasville, on or about November 4, 1899. He reached there alone on the evening of November 6, 1899, and stopped at Hotel Brighton, of which Royal J. Miller was proprietor, and who, at the request of the deceased, registered his name as guest. The next day he called Dr. A. P. Taylor, of Thomasville, with whom he had become acquainted on former visits to that place. The doctor found the deceased was "having some trouble with his kidney and bladder,—a slight hemorrhage." November 9, 1899, Dr. Taylor prescribed for the deceased. At that time his mental condition was good. He next saw the deceased December 2, 1899, when he had the stroke of paralysis, and continued to see him every day thereafter until and including December 11, 1899. He

saw him five times thereafter during the balance of that month, and thirteen times during the month of January, 1900. During that time the deceased frequently said the doctor could do him no good, that his condition was incurable, and that he would call him when he wanted him. The stroke slightly affected his speech, but he conversed upon various topics,—some outside of his physical condition. He seemed satisfied after his niece (the defendant) and nephew got there. From the time he was first called to see the deceased, down to a week before his death, the deceased was "mentally competent to understand his business affairs and to transact business"; that he "never saw a brighter man than he was, in his physical condition." The testimony of the three subscribing witnesses to the deed of gift sufficiently shows that the deceased was of sound mind and memory at the time that deed was executed. There is plenty of evidence to support the finding of the court to the effect that at no time prior to and including December 7, 1899, was the deceased feeble in mind, or unable to manage his affairs and business; but, on the contrary, down to and including December 7, 1899, and for at least three weeks thereafter, he was of sound mind,—able to manage his affairs and property.

2. It is claimed on the part of the plaintiff that the deed of gift and order on the cashier of the bank to deliver the securities to the defendant were procured by undue influence. The important fact appears that the deceased had fully planned and determined upon such transfer while the defendant was a thousand miles distant, or on the way to his bedside by virtue of a command from himself. Thus it appears from the testimony of Royal J. Miller, a witness on the part of the plaintiff, that twelve hours after the deceased had the paralytic stroke he gave to the witness the address of the defendant, and requested him to send a telegram in his name, which he did, dated at Thomasville, Georgia, December 3,

1899, and directed to the defendant, *Miss Millicent Holmes,* at Mineral Point, Wisconsin, as follows:

"Come at once Bring Ed. I want you both. Have paralysis on side. Answer immediately. Charles James."

According to his testimony, the deceased on the next day after he was so stricken, and on the same day the telegram was sent, first spoke to him "something about transferring his property to *Miss Holmes.*"

He testified further that it was at that "time that he gave me his money. He gave me receipts signed by John Johnston for three or four certificates of deposit, amounting to somewhere in the neighborhood of $125,000, and $50,000 of government bonds. At that time he stated that he wished to turn his property over to *Miss Holmes.* He asked me to write a letter to Mr. Johnston, asking him to do so. I then asked him if I understood that he wished to convey this property without any reservation, and, if so, I stated that Mr. Johnston would hardly deliver the property, under the circumstances, upon a letter written by me. He then said, 'You have all the papers,—all that I have to show for the property,'—and asked me to proceed at once to take whatever steps were necessary; that he was not business man enough to know how to act. I then advised him to wait, as his physician said he was in no immediate danger, and, being a stranger, I preferred to take no steps in the matter without the presence of some of his family. This was the first intimation from him or any one else of a desire on his part to make any disposition of his property. I think this is the only conversation I had with him about disposing of his property prior to the arrival of *Miss Holmes. I advised him before she came* that it would be necessary to engage a lawyer. I asked him if he wanted to make a deed, and I spoke to Mr. Alexander concerning this transfer prior to the arrival of *Miss Holmes.* I don't think I gave Mr. Alexander the instructions—that is, the explicit instructions—until after *Miss Holmes* came. He knew there was some paper to be drawn up, and that he would be sent for, but I did not give him instructions until after *Miss Holmes* arrived. He knew the old man was going to do something. I gave Mr. Alexander Mr. Johnston's receipt at some time for his use in the prepara-

tion of the necessary papers. Mr. Alexander may have gone to Mr. James' room and talked with him about the preparation of these papers, but not that I know of."

Mr. Hope H. Alexander, the lawyer who drew the papers, and a witness on the part of the defendant, testified to the effect that Dr. Royal J. Miller had informed him before the deceased was confined to his room that he (the deceased) "had spoken to him in regard to procuring the services of an attorney to draw an instrument of conveyance of all his property." He testified further as follows:

"December 4th or 5th Dr. Miller informed me that my services would be needed. He handed me two slips of paper,—mere memoranda of deposits in certain banks. Dr. Miller and Mr. James wished an instrument having a testamentary effect, but not a will, drawn, conveying all his property to *Miss Millicent Holmes.* I took these papers furnished by Dr. Miller, and examined them carefully. I did not understand thoroughly what he wanted, and at noon on the same day I returned to my room at the Hotel Brighton, and went to see Mr. James. I found him in his bed, and told him that I was in possession of certain memoranda handed me by Dr. Miller, which I did not understand thoroughly enough to prepare the instrument requested. I asked him to explain what he wished me to do. He said: 'I do not want a will. I simply want to give my property to my niece *Millicent Holmes.*' I understood from that what he wanted, and after exchanging a few words I returned to my office. If *Miss Holmes* had arrived in Thomasville, I did not see her. *I had not seen her up to that time.*"

According to both of these witnesses, the deceased had fully determined to transfer his property to the defendant from one to three days before she reached Thomasville, which was on the evening of December 6, 1899. The papers must have been completed or nearly completed before she reached Thomasville, as they were promptly executed the next day after she got there, and after they were read over to the deceased in the presence of the three subscribing witnesses, and he had declared them to be just what he wanted them to be.

There is no evidence that the defendant had anything to do with the execution of the papers,—much less, with the preparation of the papers. They undoubtedly embodied the "idea" or "scheme" the deceased had in his mind before leaving Milwaukee. He had spent most of the previous summer in Mineral Point, and left there in October, and went to Milwaukee, preparatory to going South. The telegram was the only communication the defendant had had with the deceased after he left Mineral Point in October. Before the defendant reached Thomasville, the deceased had, through Dr. Miller, sent for the money he had on deposit in Milwaukee, to be forwarded by draft payable to the defendant. The draft came in that form, and was between twenty-five and twenty-six hundred dollars. The defendant indorsed the draft, and Dr. Miller got it cashed at the bank, and, by the direction of the deceased, paid $2,500 of the amount to Alexander for his services in the matter. The fact that, after the execution and the delivery of the deed of gift, the deceased consented to and directed such payment to be made to the young attorney for his services may be a suspicious circumstance in the conduct of the attorney, yet it is no evidence that such deed was procured by undue influence exerted in behalf of the defendant or any one else. Of course, the amount of undue influence to invalidate a deed must necessarily vary with the strength or weakness of the mind of the person to be affected, but in any case it must be such as to destroy free agency. Here there is no evidence of any influence,—much less, of undue influence. The circumstances stated show that the deed was the result of his own volition, without suggestion from any one. Nor is the consent to such payment any evidence of a want of mental capacity at the time of the execution of the deed. True, he had been a close and frugal man; but he was manifestly convinced that he had but a few more days to live, and so he had transferred all his property, including the draft in question, to the de-

fendant. The execution of the deed was to him a very important event. It was just what he wanted. He was willing that the young attorney who drew the deed should be well paid out of the draft mentioned. Assuming that the young attorney's charges were very much too large, still, under the circumstances mentioned, it does not indicate a want of mental capacity or undue influence. So the fact, if it is a fact, that, a day or two after the execution and delivery of the deed of gift, Dr. Miller demanded, and the defendant agreed to pay, $5,000, within thirty days, for the services he had rendered, may excite suspicion as to Dr. Miller's conduct, yet it is no evidence of his having exercised undue influence or any influence over the deceased in the matter of executing the deed. There is no evidence that the deceased was a party to any such agreement. So the mere fact that the defendant, six days after the death of the deceased, voluntarily gave and transferred to the other nephews and nieces of the deceased a large portion of the property she had so received, and took back releases from them, respectively, is no evidence that she exercised undue influence over the deceased in procuring such deed of gift.

3. Exception is taken to the admission of certain testimony of the defendant as to certain declarations of the deceased made to her or in her presence, and also as to opinion evidence of certain of the nonexpert witnesses as to the mental capacity of the deceased, without stating the facts or circumstances upon which such opinions were based. Such admission of testimony may have been erroneous. But this is an equitable action. The important question is whether the findings in favor of the defendant are supported by competent evidence. We are clearly of the opinion that they are. In reaching this conclusion we exclude from our consideration all testimony to which exception was taken. We must hold that the judgment cannot be reversed on the plaintiff's appeal.

4. The defendant has appealed from so much of the judg-

ment as is in favor of the plaintiff and against the defendant for $739.12. That part of the judgment is based upon a finding that $634 which belonged to the deceased came into the hands of the defendant, and was not included in the money given to her by the deed of gift, and hence belonged to the estate of the deceased. A small portion of that money was included in the draft mentioned, made payable to the defendant, by the direction of the deceased, prior to the time when the defendant reached Thomasville. The balance of it was of money which the deceased gave to Dr. Miller "for safe-keeping as soon as he was taken sick," and before the defendant left Mineral Point. Dr. Miller appears to have deposited that money in the bank at Thomasville in the name of the defendant. It is undisputed that that money was drawn out of the bank by the defendant, and used by her in paying the expenses of the deceased and their board while at Thomasville, so long as it lasted; that it only paid a small portion of their expenses; that such money was so used by the defendant in paying such expenses by the direction of the deceased, who "told her to take that [money] and use it as long as it would last;" that "that much would not last very long," as they were then situated. Thus the money was all spent at the request and by the direction of the deceased, and really for his use and benefit. But even if it were to be regarded as a gift, yet the delivery seems to have been sufficient to satisfy a gift *inter vivos*. *Kilpin v. Ratley,* [1892] 1 Q. B. 582; *Kellogg v. Adams,* 51 Wis. 138, 8 N. W. 115; *Williams v. Hoehle,* 95 Wis. 510, 70 N. W. 556. It follows that there was no ground for holding that any portion of that money belonged to the estate.

By the Court.—That portion of the judgment of the circuit court from which the defendant has appealed is reversed, and the cause is remanded, with direction to modify the judgment accordingly, and the judgment in all other respects is affirmed.

GALLUN and others, Respondents, vs. WEIL and others, Appellants.

December 16, 1902—January 13, 1903.

Attachment: Conditions of issuance of writ: Motion to dismiss: Attachment, how executed? Due diligence in service of summons, when order therefor matter of right? Statutes: Writ of attachment, how executed: Due diligence in service of summons: Lien of attachment.

1. The only conditions of the issuance of a writ of attachment in an action commenced in the circuit court are that, concurrently therewith, a summons be issued, unless that shall have theretofore occurred; that the action shall not have proceeded to final judgment, and that it shall be one in which such a writ is proper. Whether there is a cause of action in fact against the defendant, or the statutory conditions requisite to the execution of the writ be satisfied, or the facts in that regard exist, are immaterial on a motion to dismiss the writ as improvidently granted.
2. A writ of attachment can only be properly executed upon there being attached thereto an affidavit, made by the plaintiff or some one in his behalf, satisfying the calls of sec. 2731, Stats. 1898.
3. If property be seized under a writ of attachment without sec. 2731, Stats. 1898, being complied with, the seizure may be discharged on motion, but the writ cannot be set aside on that ground as improvidently granted.
4. If the facts alleged in an affidavit for the execution of a writ of attachment, as to the liability of the defendant, do not exist, the provisional remedy must nevertheless abide the result of the suit, since no question in that regard can be raised in the proceeding to enforce the provisional remedy.
5. Independently of the liability of the defendant, the grounds of the issuance of a writ of attachment can only be questioned by a traverse of the affidavit for the execution of the writ and trial of the issues thus formed according to sec. 2745, Stats. 1898.
6. The statutory requisites to the granting of an order for service of a summons by publication being satisfied, the right to such order is absolute regardless of whether the essential allegations of the complaint and affidavit upon which it is based are true or not.

7. Neither the issuance of a writ of attachment nor the seizure of property thereunder is requisite to an order for service of a summons by publication in any case.
8. The right to make service of a summons by publication only affects the thing sought to be reached in the action; therefore, where the thing is property of the defendant within this state, the order for service by publication by the express words of the statute is granted upon the complaint, duly verified and filed, and an affidavit, together showing the facts required to exist, which in no case includes seizure of property into the custody of the law. Sec. 2640, Stats. 1898.
9. A writ of attachment issues generally against the property of the defendant not exempt from execution, and may be executed by seizing any of such property wherever found within the county of the officer having the writ, even though the property be in the possession of the plaintiff.
10. An affidavit for service of a summons by publication being made one day before the granting of the order, and stating that the plaintiff is unable with due diligence to make service of the summons upon the defendant, and further stating the diligence exercised to make such service to be the placing of the summons in the hands of an officer for service, and his inability to serve the same, as evidenced by his return thereon dated fifteen days before the making of such affidavit, is not, as a matter of law, insufficient to support the order as regards the statutory requirement that it shall be made to appear that plaintiff is unable with due diligence to serve the summons upon the defendant.
11. After property has been seized by an officer under a writ of attachment, he may leave the same with the plaintiff as his bailee to care for the same temporarily, without jeopardizing the lien of the attachment. The remark in *Mahon v. Kennedy*, 87 Wis. 50, 57 N. W. 1108, inconsistent therewith, withdrawn.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Plaintiffs, by verified complaint, alleged for a first cause of action breach of a contract with defendants for sale and delivery by the latter to the former of a certain quantity of Vienna calfskins of a specified quality, defendants' ninety-day draft on plaintiffs for eighty-five per cent. of the pur-

chase price, to be accepted by the latter upon receipt by them of the invoice and the documents showing shipments of the goods, the balance of such price to be paid upon receipt of such goods at Milwaukee, Wisconsin, and their proving, upon examination thereof, to be according to the agreement. It was alleged that the eighty-five per cent. draft, amounting to $14,669.71, was duly accepted; that subsequently the goods arrived at Milwaukee; that within a reasonable time thereafter the same were examined by plaintiffs and found not to be of the character of the skins contracted for; that thereupon defendants were duly notified thereof and that the goods would not be accepted and were at Milwaukee subject to their order; that plaintiffs demanded a refund to them of the amount of the accepted draft; that such demand was refused, and that by reason of the facts a liability of defendants accrued to plaintiffs to the amount of such draft. For a second cause of action facts were set forth, similar to those above stated, for breach of contract for the sale of a quantity of Bavarian skins, the amount of the accepted draft being $11,316.36. For a third cause of action plaintiffs alleged payment, through mistake of fact, of $419.55 for defendants' benefit, for freight charges on the two lots of skins mentioned in the first and second causes of action, said payment being made by plaintiffs in the belief that the skins were according to contract, the same not having been examined by them previous to such payment. The complaint contained further allegations to the effect that defendants were nonresidents of the state of Wisconsin, and that they possessed property within the state, such property being the skins mentioned in the complaint. A writ of attachment was duly sued out against defendants, the ground therefor being that they were not residents of this state. Upon the verified complaint, duly filed, and an affidavit, together showing the requisite facts, an order for service of the summons by publication was duly granted. The officer to whom the

writ of attachment was delivered for execution seized and took into his possession the property mentioned in the complaint, and turned the same over to one of plaintiffs as his bailor, taking his receipt therefor. The summons was served in accordance with the order therefor. A motion was made to set aside the writ of attachment and the service of the summons, it being stated in the motion papers that the defendants appeared specially for that purpose only. The grounds therefor stated in the motion papers were: (1) That defendants had no property in fact in the state of Wisconsin; that the property claimed to be theirs, to-wit, the skins mentioned in the complaint, was the property of plaintiffs and in their possession and under their absolute control. (2) That the levy upon such property was void because, at the time thereof, it was in possession of plaintiffs, and was left in their possession, the sheriff taking a receipt therefor from one of them. (3) That there were fatal irregularities in the service of the writ of attachment and undertaking. (4) That there was unreasonable delay in making service of the same. (5) That the order of publication was not supported by the statutory requisites by complaint and affidavit. The motion was based on all the papers in the case theretofore filed, and upon the two affidavits. The purpose of the affidavits was to show that the skins delivered to plaintiffs were in all respects according to the contract; that the place of delivery was in the city of New York, that they were examined there and taken possession of by plaintiffs' agent, and that before the action was commenced the title thereto passed to plaintiffs. Counter affidavits were used to the effect that the place of delivery of the goods was not in the city of New York, but was in the city of Milwaukee; that the goods were not examined by plaintiffs' agent in New York, nor did they exercise any control over them until the same arrived in the city of Milwaukee, and that only such control was then exercised as was necessary to enable them to examine the same, as they

had a right to do, to see if they corresponded to the agreement, and to retain the same subject to defendants' order. The motion was denied with $10 costs.

For the appellants there was a brief by *Doerfler, McElroy & Eschweiler,* and oral argument by *F. O. Eschweiler.*

For the respondents there was a brief by *Charles Quarles* and *Haring & Frost,* and oral argument by *George Lines* and *C. I. Haring.*

MARSHALL, J. The principal reason suggested, why the court improperly denied appellants' motion, is that they did not possess property within the state when the action was commenced. Counsel overlooked this: The statute gives every suitor with a cause of action like this the absolute right to a writ of attachment, though not to the unqualified right to have it executed. In fact, it is not necessary even that a cause of action be made to appear before the issuance of the writ and as a condition thereof. Sec. 2730, Stats. 1898, provides that "the writ of attachment shall be issued on the request of the plaintiff, by the clerk of the court, either at the time of the issuing of the summons in the action or at any time thereafter before final judgment." Sec. 2731, Id., provides that, before it shall be executed, "the plaintiff or some one in his behalf shall make and annex thereto an affidavit stating that the defendant named in such writ is indebted to the plaintiff in a sum exceeding fifty dollars, and specifying the amount of such indebtedness as near as may be, over and above all legal set offs, and that the same is due upon contract, express or implied, or upon judgment or decree, and containing a further statement that the deponent knows or has good reason to believe" either one of several things, one of them being that the "defendant is not a resident of this state." Thus, the right to the writ is conditioned only upon the issuance of a summons. The right to have it executed is dependent upon there being attached thereto the

affidavit required by sec. 2731. Whether there is in truth a cause of action in favor of the plaintiff, or whether the facts set forth in the affidavit exist, does not go either to the right to the writ or to have it executed; so the nonexistence thereof is not a good ground for setting the writ aside.

There is no controversy here but that all the requisites to the issuance and execution of the writ were fully complied with. If the facts alleged in the affidavit, independent of those respecting defendant's liability, concerning the existence of the ground entitling the plaintiff to the writ, did not exist, the remedy was not by motion to dismiss the writ as improvidently granted, but, the one provided by statute, a traverse of the affidavit for the writ and a trial of the issues thus formed. Secs. 2745, 2746, Stats. 1898. Such sections expressly leave all questions relative to the liability of defendants to plaintiffs to be determined upon the trial of the action, and require the question of whether grounds otherwise existed for the execution of the writ, if disputed, to be determined in the manner indicated.

The service of the summons could not properly be set aside for want of the facts authorizing the making of the order of publication, because the statute does not make the right to such order depend upon the truth of the allegations of the affidavit and complaint upon which it is based, but upon certain statutory requisites being complied with, namely, that the complaint shall be duly verified and filed, and that it, together with the affidavit, shall satisfy the court that a cause of action exists in which service of the summons may be properly made by publication, and that either one of several other things exists, one being that the defendant is not a resident of this state and has property therein. Secs. 2639, 2640, Stats. 1898; *Barth v. Burnham,* 105 Wis. 555, 81 N. W. 809. There is no question but that all those requisites were complied with here. Therefore, if it be not true, as claimed, that

the property mentioned in the complaint and affidavit for the order of publication belonged to defendants, that constitutes no sufficient ground for setting aside the service of the summons because the order therefor was improperly granted.

The point is made that sec. 2736, Stats. 1898, requires the writ of attachment and undertaking and inventory in attachment proceedings to be served on the defendant, and that a failure so to do renders the proceedings void. There are several sufficient answers to that. First, failure to make proper service of the attachment papers only goes to the validity of the attachment, not to the validity of the writ. Second, if that were otherwise, and there were no proper service of the attachment papers, it would not affect the service of the summons, because seizure of property under a writ of attachment is not necessary to the jurisdiction of the court over the same or authority for service of the summons upon the defendant by publication. It is sufficient if it be made to appear by the complaint or the affidavit for the order of publication that the defendant has property in this state which can be reached by proceedings to enforce the judgment in case one is rendered. The statutory requisites for an order of service by publication do not include seizure of property or any use of the provisional remedy by attachment proceedings. Attention has been many times called to that by this court, though a seizure of property is commonly supposed to be necessary because that method of proceeding is the usual and probably the only one to efficiently guard the interests of the plaintiff. *Jarvis v. Barrett,* 14 Wis. 591; *Winner v. Fitzgerald,* 19 Wis. 393; *Jones v. Spencer,* 15 Wis. 583; *Witt v. Meyer,* 69 Wis. 595, 35 N. W. 25. Third, service of the attachment papers on the defendant is not required where he is not a resident of this state.

The further point is made that service of the summons was not made within a reasonable time after the execution of the writ of attachment, and that the delay is a sufficient

ground for setting aside the attachment. The rule invoked does not apply to this case: First, because there was no unreasonable delay; and second, because the motion here was not to set aside the attachment, but to set aside the writ of attachment and the service of the summons.

Appellants' counsel next claim that property of the defendants in the hands of the plaintiffs could not be seized on a writ of attachment. If that were so it would be good ground for discharging the attachment, but not for setting aside the writ of attachment. But it is not so. A writ of attachment issues generally against the property of the defendant, not exempt from execution, and may be executed by seizing any of such property wherever found within the county of the officer having the writ. Sec. 2736, Stats. 1898, expressly so provides.

Next the claim is made that the service of the summons should have been set aside because the affidavit upon which the order of publication was made did not show that plaintiff was unable, with due diligence, to make service of the summons upon the defendants. That is based upon the fact that it appears by the affidavit that the efforts made to obtain service of the summons upon the defendants within this state were confined to delivering the summons to the sheriff with directions to serve the same, and that he returned that he was unable to make such service, the return being dated fifteen days before the making of the affidavit. Counsel rely on *Roosevelt v. Land & R. Co.* 108 Wis. 653, 84 N. W. 157, and *Rockman v. Ackerman,* 109 Wis. 642, 85 N. W. 491. Those cases are not in point. The circumstance in each, which was deemed vital to the order of publication, was the lapse of a considerable length of time between the making of the affidavit for the order of publication and the granting of the order, not, as here, between the making of the return of the sheriff upon the summons, showing his inability to serve the same upon the defendant, and the making of the affidavit.

The affidavit here was made but one day before the granting of the order. It followed the language of the statute. It stated, independently of all other matters, that the plaintiffs were unable with due diligence to make service of the summons in the action upon the defendants. There was the further statement that neither of the defendants could be found within the state of Wisconsin, although diligent effort to that end and to serve the summons upon them had been made, as shown by the return of the sheriff of Milwaukee county, Wisconsin, indorsed upon the summons and filed in the action. We find nothing in the cases to which counsel refer, calling for a decision that such an affidavit, made one day before the application for an order for service by publication, is, as a matter of law, insufficient therefor.

The further point is made by counsel for appellants, that the attachment was void because the property was left with one of the plaintiffs as bailee. To that counsel cite *Mahon v. Kennedy,* 87 Wis. 50–52, 57 N. W. 1108. The facts there were substantially as follows: The officer did not take the property into his possession at all. He made a verbal arrangement with the plaintiff to the effect that the property should be considered as levied upon and left in his hands as receiptor. The property was not at hand, nor was it then or at any time thereafter actually in the possession of the plaintiff or of the officer. There was no actual change in the custody thereof. Subsequently the same was seized by another officer under a valid writ against the owner thereof. The court held that the last attachment took precedence over the proceedings under the first writ, not because the property was left with the plaintiff after having been taken possession of under the writ, but because there was no seizure thereof or change of possession at all. This is the language of the opinion relied upon: "It is not competent to deliver it (the attached property) to the plaintiff in the attachment, nor to make him receiptor," citing Drake, Attachm. § 290. There

was no call in the facts for that expression. It is not supported by the citation upon which it is based as the same should be understood. Such citation is based on *Vanneter v. Crossman,* 39 Mich. 610, which is to the effect that an officer has no right, after having seized property under a writ of attachment by directions of the plaintiff, to thereafter surrender control thereof to the latter pending the litigation, upon his discovering that such property is his own and plaintiff's demanding possession thereof. The expression in *Mahon v. Kennedy,* so far as it conveys the idea that making a plaintiff receiptor for the sheriff, of property in his possession, under a writ of attachment in the action, is fatal to the attachment, must be withdrawn. There was no such question involved in *Vanneter v. Crossman.* It was in effect there held, and was expressly stated in Drake, Attachm. § 290, that the delivery of the property to the plaintiff under the circumstances there involved did not constitute good ground for a vacation of the attachment. An officer, after having dispossessed a defendant of property under a writ of attachment against him, may, without affecting the continued lien of the attachment, make the plaintiff his bailor to take care of the property temporarily.

What has been said covers all points presented that seem worthy of special mention.

By the Court.—The judgment is affirmed.

WALLBER, County Judge, Respondent, vs. WILMANNS, imp., Appellant.

December 16, 1902—January 13, 1903.

Estates of decedents: Testamentary trustees: Executors: Accounting: Principal and surety: Action on executor's bond: Appeal and error: Limitation of actions.

1. Where, on petition of beneficiaries under a will, the county court cites the executor to appear, file his account, and show cause why a trustee should not be appointed and the funds in the executor's hands paid over to him, the distinctive purpose of the proceeding is not changed, nor does the court lose its power to entertain and consider the whole matter and appoint such a trustee, although it does not do so until after a hearing on the executor's account, to which is attached a petition for construction of the will, followed by an appeal by the executor from the order stating his account. At most, if an irregularity, it is not one of which the surety on the executor's bond can complain.
2. Where an executor is also named as testamentary trustee under a will, his functions and duties as executor do not cease until his final account as such executor has been filed and allowed.
3. Where a county court has jurisdiction to settle and allow an executor's account, such settlement and allowance are binding on the sureties on his bond.
4. Under sec. 4014, Stats. 1898 (providing that the county court may permit an action on an executor's bond when the amount due has been ascertained and ordered paid, if the executor shall neglect to pay it when demanded), it is not necessary that a *devastavit* and default be determined against the executor before the commencement of an action on the bond.
5. An action against an heir or legatee of a surety on an executor's bond is not barred because no claim was filed against the estate of the surety, where it appears that the executor's account was not filed until after the surety's estate was settled.
6. A question cannot be considered on appeal in the absence of any findings, request for findings thereon, or exception that raises such question.
7. An executor's liability continues until his account is fully settled and the estate fully administered.
8. Where no final order has been made distributing a decedent's estate, recovery of the full amount found to be due from an

executor may be had against his surety, in an action at law on his bond, although the executor is a beneficiary under the will.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

On September 13, 1878, the defendant James S. White was duly appointed executor of the estate of Mary Ann White, and on the same day duly qualified as such by accepting said trust and filing a bond in the usual form, signed by Frederick Wilmanns and F. S. Blodgett as sureties, in the sum of $20,000. Said bond was duly approved, and letters testamentary were duly issued. White thereafter entered upon the discharge of his duties, and took possession of all the property of deceased, and converted it into money prior to October 1, 1884. Prior to the proceedings hereinafter mentioned, the last account of White as executor was filed in 1884. On October 1, 1896, two of the beneficiaries under the will made separate petitions to the county court for the purpose of requiring White to file his final account, one of them asking that he be required to settle his account, and pay over to a trustee, to be appointed, the moneys they were entitled to. The citation was issued, but a hearing was delayed because of the disqualification of the county judge, but was finally heard by Judge BELDEN. On February 21, 1899, White filed his account. Objections were filed thereto, and a guardian *ad litem* for certain minors was appointed. In October White attached a petition to his final account, asking that a certain clause in Mrs. White's will be construed. On December 13, 1899, an order was made by Judge PERELES stating the executor's account, charging him with $7,410.95 over disbursements, and construing Mrs. White's will, which order was reduced to writing on December 29th. On December 13th all the parties interested in the estate were present or represented, and the matter of the appointment of D. L. Jones as trustee was talked

over, and virtually agreed upon, but no order was then entered. Later Mr. White appealed to the circuit court from the order stating his account. The case was tried, and by the judgment of the circuit court the order of Judge PERELES was affirmed, and the case remanded. On September 7, 1900, the order appointing the Mr. Jones as trustee was made, and thereafter a bond was filed as required and letters of trust were issued. Jones, as trustee, made a demand upon White to pay over the sum in his hands as executor, which was refused. Thereafter the trustee made a petition to the county court setting out the former proceedings, the demand and refusal of White to pay over, and prayed leave to commence this action on White's bond in the name of the county judge. Such leave was duly granted. In the meantime the surety Blodgett died insolvent. On January 12, 1891, the surety Wilmanns died testate, and his estate was closed, and his property assigned to the defendant *Marie Wilmanns* on March 18, 1892, and prior to the filing of White's account as executor, which estate amounted to more than $14,000. This action is to recover from *Mrs. Wilmanns* and the executor, White, the amount held by the latter hereinbefore mentioned. The defendants made separate answers, admitting many of the matters alleged in the complaint, but denying the rightful appointment of Jones as trustee, and setting up some matters that will be referred to in the opinion. The court found the facts, and by the ninth, tenth, and fifteenth findings found that Jones was duly appointed as trustee, and that White had refused and neglected to comply with the terms of his bond as executor upon demand. Both defendants excepted to these findings. Judgment was entered for the plaintiff for $8,394.70 and costs, from which *Mrs. Wilmanns* takes this appeal.

For the appellant there was a brief by *Pierson W. Halsey,* attorney, and *Charles Quarles,* of counsel, and oral argument by *Mr. Halsey* and *Mr. George Lines.*

William Kaumheimer, attorney, and *D. Lloyd Jones,* of counsel, for the respondent.

BARDEEN, J. 1. Many questions are raised on this appeal, the chief of which is whether the county court of Milwaukee county had the right or jurisdiction to appoint Mr. D. L. Jones as trustee. We have been greatly aided in a solution of this question by the written opinion of the trial judge found in the record, but not printed, as it ought to have been. It requires little more than a statement of the facts to show that the defendant's contention is without foundation. Much of defendant's argument is based upon false assumptions of what the record discloses. It appears that from 1884 to 1896 White, the executor, made no accounting to the court. His final account had never been presented or allowed. In October, 1896, two of the persons interested in the estate petitioned that he be cited to appear and file his final account and show cause why he should not pay over the funds in his hands to a trustee. Such citation was issued, and he was directed to show cause why a trustee should not be appointed, etc. This set the machinery of the law in motion, and the fact that matters were delayed for some time did not change the distinctive purpose of the proceeding. The court had full jurisdiction of the proceeding, and no one is here complaining of want of notice who has any right to do so. Neither did the delay in procedure devest the court of its power to entertain and consider the matter. The different steps in the case of White's thereafter filing an account and a petition to have the will construed, and his appeal thereafter, did not oust the court of the right to hear the whole matter, and the fact that eventual relief was secured by several orders in the case is not one that the appellant can take advantage of in this collateral way.

It does not alter the situation at all that White was testamentary trustee. His duties and functions as executor did not, in law, cease until his final account as such had been filed

and allowed. See *Barney v. Babcock's Estate,* 115 Wis. 409, 91 N. W. 982. The county court had ample jurisdiction to settle and allow his account, and such settlement and allowance are binding upon the sureties on his bond. His duties as executor continued until he qualified as testamentary trustee, and, as it does not appear that he had so qualified, he held the money in his hands as executor until his final account was settled. *Schinz v. Schinz,* 90 Wis. 236, 63 N. W. 162. It abundantly appears that at the time the order allowing his account was made, it was talked over that Mr. Jones should be appointed as trustee, and that Mr. White consented to that arrangement. The fact that White took an appeal from such allowance and some little time intervened before the order of appointment of the trustee was actually entered, is not considered one that vitiates such appointment, or, if deemed an irregularity, is not one the appellant is in a position to take advantage of.

2. Another point urged by appellant is that the judgment against her is void because a *devastavit* and default had not first been determined as against the executor. There are some things said in *Barth v. Graf.* 101 Wis. 27, 37, 76 N. W. 1100, 1103, which would seem to justify that contention. This language is there used:

"And yet in all such cases it would seem the breach of the bond must be fixed by the judgment, decree, or finding of the court having jurisdiction, before an action will lie against the sureties on the bond."

This is the rule sustained by the great weight of authorities, *in absence of a statute on the subject.* 2 Brandt, Sur. (2d ed.) § 578. The mistake we made was in overlooking the fact that we have a statute on the subject. We think sec. 4014, Stats. 1898, fully covers the situation, and renders further discussion of the question unnecessary. The statement in *Barth v. Graf,* referred to, must be considered as modified as to all cases coming within the purview of sec. 4014. There

are also very grave doubts of the question being before us because of the failure of the court to make any findings that fairly cover the question, and because of failure of appellant to raise it by any proper request to find, or exceptions. If the question is before us at all, it is considered that the amount that should go into the hands of the trustee had been established by the court, and a demand and refusal of the trustee to pay over shown. The order permitting the trustee to commence this action was one which might have been secured without notice, and was not open to collateral attack. *Roberts v. Weadock,* 98 Wis. 400, 74 N. W. 93.

3. Another point urged with some confidence is that the right of action against the heir or legatee of the deceased surety, *Mrs. Wilmanns,* is barred, because no claim was filed against the estate of the deceased surety. The surety died in January, 1891, and the estate was distributed March 18, 1892. There are no findings, requests to find, or exceptions that raise the question. If the question were fairly presented, still we think the situation is not such as to call for an application of the statute. The executor did not file his annual account until long after the estate of Willmanns had been settled, and no claim was in existence that could have been filed during the pendency of settlement. The situation seems to have been fully covered by what was said by this court in *Mann v. Everts,* 64 Wis. 372, 25 N. W. 209, and *South Milwaukee Co. v. Murphy,* 112 Wis. 614, 88 N. W. 583, against the appellant's contention.

4. Another claim is that the claim against *Mrs. Wilmanns* is barred by secs. 4014 and 3968, which are claimed to operate as statutes of limitation. This question was raised by the answer, yet, as in the cases before mentioned, there is no finding, request to find, or exception which present the question. We note on passing, however, that the executor's liability is held to continue until his account is settled and the estate fully administered. Gary, Prob. Law, § 253, note 110,

§ 480, note 25; 3 Woerner, Adm'n, 62. And see *Barney v. Babcock's Estate,* 115 Wis. 409, 91 N. W. 982. The judgment of the county court that White held the sum in controversy as executor is binding upon the sureties, and cannot be impeached in a collateral proceeding.

5. Finally, appellant objects to the amount of the judgment against her, because: First, the judgment included the income payable annually to the brothers and sisters of the executors; and, second, because, under the terms of his mother's will, he owns a one-fourth interest in the estate he holds. As to the first proposition, the finding of the county court is conclusive. It must be presumed that the court took into consideration all expenditures made by the executor up to the date his account was settled in 1899, and confirmed on appeal in 1900. The binding character of this judgment has already been alluded to. The answer to the second proposition is evident from the fact that, no final order having been made settling or distributing Mrs. White's estate, the trial court had no means of knowing how much would be the share of each distributee. This being an action at law on the bond, the court could not usurp the functions of the county court, and make a distribution of the estate held by the executor. When the matter comes before the proper tribunal, no doubt the court will protect *Mrs. Wilmanns* from any loss on account of any claim of White to the fund in controversy.

Many other questions have been raised and discussed by the appellant, but which are without any foundation in the record. Any that are not here noticed are deemed to have been correctly decided by the trial court.

By the Court.—Judgment is affirmed.

THE STATE EX REL. WINCHELL VS. THE CIRCUIT COURT FOR WAUKESHA COUNTY.

December 16, 1902—January 13, 1903.

Certiorari, *when not proper remedy: Change of venue pending trial:* Mandamus: *Supreme court: Superintending power: Correction of jurisdictional excesses: Practice.*

1. In a suit to abate a nuisance, pending in a county court having civil jurisdiction, the action was tried on equitable issues, the order therefor providing that, should judgment thereon go against defendant, the ultimate assessment of damages be made by a jury or referee. Interlocutory judgment on the equitable issues having been entered in favor of plaintiff, it was affirmed on appeal. After remission of the cause it was placed on the calendar for trial. Thereupon the defendant filed an affidavit of prejudice of the judge, and an order was entered changing the place of trial to the circuit court. *Held*, that such order, changing the place of trial, was void, being beyond the jurisdiction of the court, since it was made after the trial had commenced and while it was not yet fully completed.
2. Where, on application for a change of venue, the court's action in actually transmitting the record is beyond its jurisdiction, because taken after the trial had commenced, and, on due motion therefor, the court to which the record has been physically transmitted refuses to remand the record, the only process by which the supreme court can compel the granting of an order remitting the record to the county court, is by writ of *mandamus*.
3. In such case, since reversal of the action of the court to which the record has been transmitted will still leave the record in the wrong court, and the relator in the same predicament, the supreme court will not allow a litigant to invoke its superintending power, as nothing practical can be accomplished thereby.
4. Where a county court exceeds its jurisdiction in improperly transmitting the record in a cause to the circuit court, the latter court has jurisdiction to hear and decide a motion to remand the record, and such motion being within its jurisdiction an order denying the same cannot be reviewed on *certiorari*.

Certiorari to review an order of the circuit court for Waukesha county: JAMES J. DICK, Circuit Judge. *Writ quashed.*

Motion to quash a writ of *certiorari* addressed to the circuit court, and based upon the following facts: The relator having brought an action in the county court for Waukesha county against the city of Waukesha to abate a nuisance consisting in the emptying of impure and noxious sewerage into a stream above and near her land, and to recover damages thereby occasioned, and that action being at issue, both as to the existence of the nuisance and the amount of damages, it was called for trial on May 19, 1900. Thereupon the court directed (the parties consenting) that the action be tried upon the equitable issue, or upon all the issues except the question of damages; the judgment to provide, should it be against the defendant, for the ultimate assessment of damages by a jury or reference. Interlocutory judgment was entered in favor of the plaintiff, and, upon appeal to this court, was on April 9, 1901, affirmed, with slight modification. 110 Wis. 101, 85 N. W. 668, 84 Am. St. Rep. 902. After remission of the case, it was placed on the calendar, and the judgment of the county court modified to conform to the mandate of the supreme court; and thereupon, on March 4, 1902, the defendant filed an affidavit of prejudice of the judge of said court, whereupon an order changing the place of trial to the circuit court of *Waukesha* county was entered, and the records transmitted to that court. Thereupon the plaintiff, upon affidavits showing substantially the foregoing facts, moved the circuit court for an order remanding the record to the county court, which order, on June 10, 1902, was denied by the circuit court; that court holding that said action was properly removed. Original writ of *certiorari* from this court was sued out upon the assertion that the circuit court had no jurisdiction of the case, "to the end that this court may be certified of all proceedings in said action, and said order overruling plaintiff's motion to remand the records in said action to said county court duly reversed." The circuit court made return of the entire record, and now moves to quash said writ as improvidently issued.

For the relator there was a brief by *Armin & Waite,* and oral argument by *C. E. Armin.*

For the respondent the cause was submitted on the brief of *Henry Lockney,* attorney, and *H. J. Frame,* of counsel.

DODGE, J. That the order of the county court changing the venue of the action of *Winchell v. Waukesha,* 110 Wis. 101, 85 N. W. 668, was made after the trial had commenced, and while it was not yet fully completed, seems too obvious for debate, in the light of the decisions. *Swineford v. Pomeroy,* 16 Wis. 553; *Cairns v. O'Bleness,* 40 Wis. 469; *Grobman v. Hahn,* 59 Wis. 93, 17 N. W. 545; *Duffy v. Hickey,* 68 Wis. 380, 32 N. W. 54; *Peterson v. Daniel Shaw L. Co.* 93 Wis. 500, 67 N. W. 1118. Hence, of course, that order, when made, was beyond the jurisdiction of the county court and void, and, had it been called to the attention of this court by *certiorari,* must have been reversed. *State ex rel. W. G. Taylor Co. v. Elliott,* 108 Wis. 163, 84 N. W. 149. That, however, was not done, but the record was allowed to be physically transmitted to, and entered in, the circuit court, so that affirmative action became necessary to secure its remand to the court from which it had been improperly sent. In that situation, application for such affirmative action was made, and was simply refused by the circuit court. The present writ seeks merely to review the action of the circuit court in refusing such application. That must be denied, for two entirely sufficient reasons: First. That the only relief possible to accord on *certiorari,* namely, reversal of the order complained of, would be futile and ineffectual, and this court will not allow litigants to invoke its superintending power over inferior courts when nothing practical can be accomplished thereby. Clearly, the only act by the circuit court which can yield relator practical relief is an affirmative order remanding the record. The only process by which this court can compel the granting of any such order is *mandamus.* The situation

here presented is the converse of that in *State ex rel. W. G. Taylor Co. v. Elliott, supra.* There the record had not gone from the proper court, and the reversal of an affirmative order prevented it from going, and preserved the *status quo.* Here, on the contrary, reversal of the order complained of will still leave the record in the wrong court, and the relator in the same predicament as now. Further, however, it is apparent that since this record cannot pass out of the circuit court, and back to the county court, without action by the circuit court, such action is within its jurisdiction. In other words, the circuit court had jurisdiction to entertain relator's motion to remand, and to consider and decide thereon. This constitutes jurisdiction. *State v. Ludwig,* 106 Wis. 226, 233, 82 N. W. 158. Hence the order denying relator's application, now complained of, was within the jurisdiction of the circuit court, and cannot be reviewed upon *certiorari.* That process, when addressed to other courts, reaches only the question of their jurisdiction. *Hauser v. State,* 33 Wis. 678; *State ex rel. Barteau v. Circuit Court,* 101 Wis. 422, 77 N. W. 745.

For these reasons, it is apparent no practical relief is obtainable upon the present writ, and the same should be quashed.

By the Court.—So ordered.

GEORGE M. NEWHALL ENGINEERING COMPANY, LIMITED, Respondent, vs. DALY, Appellant.

December 17, 1902—January 13, 1903.

Building contracts: Rescission by owner: Rights of contractor: Measure of damages.

1. Where the contractor for the erection of a building is not himself in default, and, after he has gone to substantial expenses in its partial completion, the owner wrongfully prevents him from

completing the contract, the contractor may elect, either to insist on the continued existence of the contract, that he be permitted to perform, and recover damages for its breach, or he may treat the owner's act as a declaration of rescission, assented to by him. In the latter case, where the contract itself provides for no apportionment of compensation, he may recover *quantum meruit* the reasonable value of the work done by him prior to such rescission.

2. Plaintiff contracted to erect a bottling and refrigerating works for defendant. In an action thereon the evidence (stated in the opinion) is *held* to establish that, after plaintiff had gone to substantial expense in partial completion thereof, defendant wrongfully prevented plaintiff from further progress with the work, and that therefore it was not error to award plaintiff judgment for the reasonable value of the work done.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

About the 1st of July, 1900, the Pabst Brewing Company, of Milwaukee, was in treaty to erect on certain real estate belonging to it in Havana, Cuba, certain bottling and refrigerating works, and to sell the same at an agreed price, after erection, to one Reminez. They had substantially closed a bargain with the defendant to erect said buildings and put in the necessary machinery at a price of something over $50,000, whereupon the defendant entered into a written contract with the plaintiff to erect the buildings according to plans and specifications at an agreed lump price of $23,000. No time of completion was specified in that contract, but it was known to the plaintiff that *Daly* was bound to have the buildings completed and the machinery installed, ready for delivery to the Pabst Brewing Company, by December 1st of that year, and that the Pabst Brewing Company was bound to deliver to Reminez by December 15th. Plaintiff immediately proceeded with the work, and continued same with diligence up to November 8th, when it ceased active work thereon by discharging all except a few of the men, although it had on the ground a considerable amount of material, and retained there

its foreman and a few men, who were engaged in sorting and arranging that material. The evidence of the progress made at that time is very conflicting, varying from the contention that the work was but one-third done to the contention that it was four-fifths completed. The court finds that it was somewhat more than half of the entire work. On November 21st the defendant went through a procedure before a notary, called a "protest," in which he asserted imperfection in the work done, and thereupon took possession of the work, excluded the plaintiff, and completed it. The plaintiff claims that it did not abandon the work, but suspended for want of municipal permits, at the command both of the defendant and of the owner of the property; the defendant having agreed to obtain such permits. The defendant, however, claims that the conduct of the plaintiff constituted a wilful abandonment of the work. Plaintiff brought this action to recover the reasonable value of the work done, which the trial court found to be $17,500, of which $2,500 had been paid. The defendant denied any liability by reason of plaintiff's abandonment of the work, and counterclaimed for that the work done was defective, both in material and workmanship, whereby it became necessary for him to spend a large sum in remedying such defects, and also claiming that he necessarily expended, in completing said buildings, about the sum of $35,500, or $15,000 in excess of the amount remaining due the plaintiff on its contract. The trial court found that plaintiff did not abandon the work, but suspended the same by reason of the failure of the defendant to procure necessary permits, and by reason of prohibition against proceeding without such permits, and that it was at all times ready to complete said work when that omission on the part of the defendant was remedied; that the defendant fraudulently, and for the purpose of preventing plaintiff from going on with the work, withheld said permits, and falsely made claim of defects in the

workmanship and material of the work already done, and took possession of the premises, and excluded the plaintiff from completing its work; that the reasonable value of plaintiff's work, above payments, was $15,000; that it was performed according to contract, and was not defective; and that no sufficient evidence had been given of the cost of completing the buildings; and accordingly rendered judgment allowing defendant nothing upon his counterclaims and awarding plaintiff $15,000. From this judgment, defendant appeals.

For the appellant there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *C. F. Fawsett* and *F. C. Winkler.*

Jackson B. Kemper, of counsel, for the respondent.

DODGE, J. In the presentation of this case, counsel have discussed the rules of law governing the rights of parties upon the partial completion of an entire contract in each of three different phases: First, when the breach is committed by the plaintiff wilfully, without fault of the defendant, and without any excuse; secondly, when the failure to complete the contract is due to the wrongful act of the defendant, preventing the plaintiff, without default on his part, from completion; and, thirdly, an intermediate phase, where neither party is strictly at fault, but through oversight, or by force of circumstances beyond the control of either, the work is not fully completed, but a portion of it performed at expense to the plaintiff, resulting in substantial benefit to the defendant. Of course, when it is ascertained which of these phases is presented in the individual case, discussion of the rules of law governing the others is unnecessary. It becomes necessary, therefore, to first consider the facts of this case, to which must be applied the law in deciding upon the rights of the parties.

A referee, with whom has concurred the trial court, has attempted, in an exhaustive finding, to settle those facts to

substantially the following effect: The plaintiff, from early in July up to the 8th of November, diligently, and in substantial accord with its contract, performed the work to an extent exceeding one-half its total. Thereupon it suspended work by reason of insistence to it by the defendant that official permits were necessary to its further prosecution, and by the owner of the ground, to whom obviously the plaintiff was authorized by the defendant to defer, that the work must stop until those permits were obtained; defendant having agreed, for a consideration paid by the plaintiff, to obtain such permits. Plaintiff did not, either in fact or in law, thereby abandon the work, but its cessation was not only proper, but was substantially rendered necessary by the act of the defendant. While the work was so suspended, the defendant, without right, took possession of the work, and thereafter excluded the plaintiff therefrom. This summary is not entirely in the language of the findings, and perhaps includes one or two elements not expressly declared, but, in light of the controversies between witnesses and of the evidence generally, they are capable of no other construction. After a careful examination of all the testimony, we are unable to say that these findings are so without support from credible evidence, or so antagonized by any clear or overwhelming preponderance, as to convince us that the court, through mistake, prejudice, or other cause, did not give such evidence proper consideration. *Hill v. Am. Surety Co.* 112 Wis. 627, 631, 88 N. W. 642. It must be conceded that several of the facts thus found are controverted by positive and direct testimony of witnesses, which, if believed, might constitute a preponderance to the contrary, possibly clear and overwhelming; but the extent to which such witnesses were impeached, either by fully established facts, their own inconsistencies, or, where present upon the trial, by their appearance and manner, was a subject especially within the capacity of the referee to decide. Throughout the case witnesses placed themselves in such com-

plete contradiction to each other that the inference of wilful falsification by one or the other was at least justifiable, and the referee could hardly have reached a conclusion either way without first deciding in his own mind against the credibility of certain witnesses. If, as seems probable, his conclusion was against the honesty and integrity of the defendant and certain of his witnesses, that fact became a cogent one in reaching the further conclusion as to the bad faith of the defendant in the performance of certain conceded acts; as, for example, giving a written demand to the plaintiff's agent, shortly before the defendant took possession of the work, requesting plaintiff to continue and complete it. This was accompanied by what was substantially a notification that defendant would repudiate the work already done, unless modified and changed to an extent which he testified would cost nearly as much as the work itself. Obviously, if such defects existed, there would be no inducement to the plaintiff to attempt to go on with its work, and the court has concluded that this demand to continue was not in good faith, but was fraudulently accompanied and burdened by a false declaration, calculated and intended to deter the plaintiff from acceding thereto. Other illustrations might be given and evidence pointed out to show the incorrectness of appellant's assertion that certain of the material findings are without support, or that certain conflicting facts resting on discredited evidence are undisputed; but, as often stated, no extended discussion of the evidence is warranted, where, after its examination, this court concludes that the material findings are supported. *Laycock v. Parker,* 103 Wis. 161, 172, 79 N. W. 327. These findings, construed in the light of the evidentiary issues and the opinion of the referee, bring the situation clearly within the second of the above-enumerated phases, where the plaintiff, without substantial default on its part, is wrongfully prevented by the defendant from completing the contract. The failure to perform the work up to that time in substantial accord with

the contract is negatived, except so far as variations were assented to and waived by defendant, or so far as those alleged consisted merely in incompleteness; and there is evidence to that effect. Failure of expedition is negatived by the finding that no time of performance was fixed by the contract, and that plaintiff proceeded with diligence. Suspension of the work on November 8th is found to have been justified by absence of permits and by prohibition against proceeding without them, and not to have been an abandonment. These are the only suggested delinquencies on plaintiff's part up to the time defendant took possession of the premises and work to the exclusion of plaintiff. Defendant urges that there is no finding that the permits were necessary in law to enable plaintiff to proceed with its work, but there is finding and abundant evidence that they were necessary in fact, since the owner of the property prohibited continuance without them. We think the evidence shows that the defendant did also, if that fact were necessary to support the judgment. Thus the plaintiff, being no wise in default, and not having abandoned the work, on November 21st the defendant took possession, and thereafter excluded plaintiff, thus rendering impossible his completion of the contract.

To the situation thus summarized the rules of law applicable are not doubtful; indeed, are not seriously controverted by appellant's counsel. If appellant wrongfully prevented plaintiff, not in default, from completing its contract, after it had gone to substantial expense in its partial performance, he placed plaintiff in a predicament, and conferred upon it, as a result, the right of choice between two methods of escape. Plaintiff might have insisted upon the continued existence of the contract, and upon being permitted to perform it, and have recovered its damages for breach thereof; or, recognizing the impossibility of carrying out the contract by reason of defendant's wrongful act, it was at liberty to treat such act as a declaration on defendant's part of rescission, and to meet the

same with an assent thereto on its part, in which case, certainly where the contract itself provided for no apportionment of compensation, it might recover *quantum meruit* the reasonable value of the work done by it prior to such rescission. Such rule is but the imposition of the ordinary condition that he who rescinds a contract—which the defendant does by rendering its performance impossible—must reestablish the other party in his *status quo*. *U. S. v. Behan,* 110 U. S. 338; *Adams v. Burbank,* 103 Cal. 646, 37 Pac. 640; *Hemminger v. Western Assurance Co.* 95 Mich. 355, 54 N. W. 949; *Davis v. Hubbard,* 41 Wis. 408. Respondent has adopted the latter course, and the trial court, correctly following the rule of law last stated, has found the reasonable value of the work done by plaintiff, and awarded judgment therefor, in which there is no error.

By the Court.—Judgment affirmed.

GEHL and another, Respondents, vs. MILWAUKEE PRODUCE COMPANY, Appellant.

December 17, 1902—January 13, 1903.

Sales of chattels: Contracts: Breach by vendee: Evidence: Special verdict: Instructions to jury: Time to take exceptions: Due diligence: Trade custom: Measure of damages.

1. In an action for damages, based on a refusal to accept goods sold under a contract for delivery at any time before a certain date at buyer's option, there was conflict as to an alleged consent to postponing the time of delivery, and as to a tender of delivery on the original and postponed date. *Held,* that submitting to the jury a question whether the defendant refused to accept the goods upon an offer to deliver the same in accordance with the contract, and at a time when, by virtue of the postponements agreed upon, they still had a right to deliver, was error. Such question involves several issues, and an affirmative answer to the question does not indicate that the jury were all agreed upon the same facts.

2. In such case, an instruction, in effect, that it was incumbent on the plaintiff to deliver the goods in accordance with the contract at defendant's place of business, and at a time when, by virtue of the postponements agreed to, plaintiff still had a right to deliver, and that "it was immaterial when such offer to deliver was made, provided you find it was a time when, by reason of the postponements, the plaintiff had a right to deliver, and made the offer to deliver in accordance with the terms of the contract," is *held* to be misleading and confusing, if not positively erroneous; it leaves the jury to infer that delivery might be tendered at any date before the time expired.
3. In such case, that part of the instruction that there must be an offer to deliver "in accordance with the contract" at defendant's place of business, is too indefinite, where it appeared that the contract required manual delivery, and there was still in the case, and before the jury, evidence of offers of delivery of warehouse receipts, the jury being given no express or implied instruction that such offers of warehouse receipts were ineffective.
4. Exceptions to refusal to instruct the jury subserve their purpose, and are taken in due time, if taken after the retirement of the jury and before verdict.
5. In an action for damages, based on a refusal to accept goods under a contract of sale, it was conceded that the proper method of delivery was tendering actual delivery of the property. *Held*, that it was error to refuse to instruct the jury that a tender of warehouse receipts covering such goods was not sufficient.
6. Under a contract of sale of goods, delivery to be at buyer's option on or before a certain date, the time of delivery was extended after an offer to deliver. *Held*, that the buyer was not in default unless there was a new offer of delivery at the close of the extended period.
7. Under such contract a delay of ten days after the date of tender of delivery, on a falling market, and until the season for the particular goods was nearly over, before attempting to make a resale, is not due diligence.
8. Where, after the buyer of goods has refused to accept them, the seller afterwards received and refused a *bona fide* and responsible offer for the goods at a higher figure than that finally obtained, the resale cannot be said to have been made with due diligence.
9. Where the contract for the sale of seeds was silent as to where the seeds were to be weighed, it was competent to show a uniform trade custom not to accept the weight on certain scales.

10. If competent evidence is admitted on the question of such a trade custom, instructions to the jury as to its effect should be given.
11. An instruction that, if the jury find any witness has sworn falsely as to any material fact, the jury is at liberty to reject his entire testimony, unless corroborated, is erroneous in omitting the element of wilful false swearing.
12. It is inaccurate to instruct the jury that the necessary damages, for refusing to accept goods under a contract of sale, are the difference between the contract price and the sum the plaintiff could have obtained by due diligence after defendant's refusal to accept.
13. In case of the breach by the vendee of an executory contract for the sale of goods in refusing to accept the same, the measure of the vendor's damages is the difference between the market value of the property at the time of the breach and the contract price.
14. In such case the market value is the amount realized by a resale, if the vendor exercises all reasonable diligence in the resale to secure the best price obtainable.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This is an action to recover damages on account of the defendant's refusal to accept and pay for 160 bags of white clover seed in alleged breach of a contract made between the parties orally February 1, 1897, and confirmed by the following written memorandum on the following day:

"Milwaukee, Feb. 2, 1897.

"M. & N. Gehl—*Dear Sirs:* Confirm purchase about 160 bgs. white clover 8¾; 9 bgs. 6c; 9 bgs. 5c; 25 bgs. red 7¼; screen 2c; buyer's option March 1.

"Truly yours,

"MILWAUKEE PRODUCE CO."

This was a contract requiring the plaintiffs to deliver and the defendant to accept the seed upon defendant's request at any time prior to March 1st, and in no event later than that date. The answer was, in effect, a general denial; but on the trial the making of the contract was admitted, and the defense

relied on was that the plaintiffs had breached the contract by not delivering or offering to deliver the seed according to the contract. The case was here upon defendant's appeal from a former judgment in plaintiff's favor, and will be found reported in 105 Wis. 573, 81 N. W. 666, where a full statement of facts will be found. Another trial of the action has been had, and much of the evidence given on the former trial has been substantially repeated on the present trial, with some important differences, which will be found stated in the present opinion. The following special verdict was rendered by the jury:

"(1) Did the defendant refuse to accept the clover seed in question upon an offer by plaintiffs to deliver the same in accordance with the contract, and at a time when, by virtue of the postponements agreed upon, they still had a right to deliver it?" Answered by the jury, "Yes." "(2) If the court shall be of the opinion that the plaintiffs are entitled to judgment, in what sum do you assess their damages?" Answered by the jury, "$779.07."

The defendant then filed the following exception:

"The defendant excepts to the first question of the special verdict, and to the submission thereof by the court to the jury, for the reasons that said question assumes matters of fact not admitted, involves two issues, does not submit any material issue to be determined by the jury, and the submission of said question is contrary to law."

Upon this verdict judgment was rendered for the plaintiffs for the damages found by the jury, with costs, and the defendant appeals.

For the appellant there was a brief by *Roemer & Aarons*, and oral argument by *C. L. Aarons*.

For the respondents there was a brief by *Miller, Noyes & Miller*, and oral argument by *A. W. Fairchild*.

WINSLOW, J. As indicated in the foregoing statement of facts, there were several important differences in the evi-

dence upon the second trial from that which had been given on the first trial. Upon both trials it was admitted that there was no attempt to deliver the seed on March 1st, and that the time for delivery was, by general consent, extended to the 14th or 15th of March, but here the difference begins. Upon the former trial the plaintiffs simply claimed to have made a valid offer of delivery of the seed on March 15th by presenting to defendant a warehouse receipt for the seed, with unpaid storage charges thereon from December 18, 1896, accompanied by a draft calling for payment of the contract price thereof, with interest from March 1st; and they practically rested their case upon the claim that this constituted a valid delivery under the contract. The defendant, however, contended that delivery must be made at its store, and offered evidence tending to prove that such was the uniform trade custom in Milwaukee. In this state of the evidence the court refused to submit the question of the existence of the alleged custom to the jury, and only submitted two questions of fact on this branch of the case, namely: (1) Whether the plaintiffs, on March 1st, notified the defendant of their willingness to perform; and (2) were the postponements thereafter had at the instance of the defendant or of the plaintiffs? It was held that the question as to the existence of the alleged custom should have been submitted, and, further, that the two questions above recited were inconclusive, however they were answered, and that the true issue was "whether the defendant refused to accept the merchandise upon an offer by the plaintiffs to deliver in accordance with the contract, and at a time when, by virtue of the admitted postponements, they still had a right to deliver." As there was but one offer to deliver relied on by the plaintiffs upon that trial, namely, the alleged offer of March 15th, and as there was no dispute concerning the postponements, the issue so suggested was a single issue, involving simply the consideration of the question whether the offer of the warehouse receipt and the accompanying

draft on March 15th constituted a valid offer of delivery of the seed pursuant to the contract. The plaintiffs' alleged notification of willingness to deliver on March 1st cut no figure, because postponements were agreed upon, and the contract was to deliver at the *buyer's option;* hence, when plaintiffs had agreed to an extension of the time beyond March 1st, within which the buyer could exercise his option, they could not put the defendant in default by an offer to deliver on that date. They must then deliver or offer to deliver at any time within the postponement when defendant exercised its option, or, if not exercised at all, then at the end of the postponed period.

Upon the present trial, however, there was a material change in the situation as presented by the evidence on the part of the plaintiffs. The testimony of a teamster was introduced to the effect that he took a wagon load of the seed, on the 15th of March, to the defendant's store, and made an offer to make manual delivery at the store, and that the defendant's officers refused to receive it. There was also further evidence on the part of the plaintiffs that the defendant requested and the plaintiffs consented to further postponements of the time of delivery after March 15th until the 26th day of March, when one of the plaintiffs, accompanied by Mr. McCabe, their attorney, made a new offer to deliver by presentation of a new warehouse receipt with all storage charges paid, accompanied with a bill and draft from which the item of interest had been omitted, and also offered at the same time to make actual delivery of the seed, both of which offers were refused. Both of these offers of actual delivery were denied by the defendant's managing officer, Mr. Reel, who also denied that any extension after the 15th of March was asked or agreed on. Furthermore, it was, in substance, admitted by plaintiffs on the trial that the contract called for actual delivery at the defendant's store, and plaintiffs' counsel state in their brief upon this appeal that they do not contend that the

offers to deliver warehouse receipts were offers in accordance with the terms of the contract. It is very evident that these changes in the evidence as to offers of actual delivery at the store, together with the admission that such delivery was the delivery required by the contract, make a radical change in the issues upon which the case depends. No longer does the evidence present the single question whether there was a valid offer to make delivery and a refusal to receive on the 15th of March, but several questions are presented, namely: (1) Whether the time of delivery was, by consent, postponed to March 26th; and, if so (2) whether there was an offer to make actual delivery and a refusal to accept on March 26th; and, if there was no postponement after March 15th, (3) was there an offer to make actual delivery and refusal to accept on March 15th? Notwithstanding this change of issues, the trial court put to the jury the question stated by this court upon the former appeal as the issue in the case. It is plain that upon this trial that question was not the proper question, because, as applied to the evidence now before us, it involves three separate questions. The questions in a special verdict should present single issues of fact which are capable of certain answers. *Carroll v. Bohan,* 43 Wis. 218. In the instant case we cannot tell what facts the jury found when they answered "Yes," to the first question submitted to them, nor can we tell whether they agreed upon the same facts. Some may have concluded that there was no postponement agreed upon after March 15th, and that the alleged offer of delivery at the store was made on that day, while some may have thought that there was a postponement, and that the alleged offer of delivery was validly made on March 26th; and so the jury may have all agreed that the question should be answered in the affirmative, though disagreeing on the vital facts at issue. So the answer becomes uncertain, and we do not know from it what facts the jury found, or whether they agreed on any facts. It follows, necessarily, that there must

be a new trial of the action, because the verdict does not determine the material facts in the case.

There are, however, a number of alleged errors in detail which are fairly presented, and which should be passed upon, especially in view of the fact that there must be a new trial. The trial court, in charging the jury upon the first question of the verdict, gave the following instructions, which were duly excepted to:

"It is incumbent upon the plaintiffs to establish by a preponderance of the evidence that the plaintiffs offered to deliver the clover seed in question, in accordance with the contract, at the defendant's place of business, and at a time when, by virtue of the postponements agreed upon between the parties, they still had a right to deliver it; and to further establish that the defendant refused to accept the same. It is immaterial, in the consideration of this question, when such offer to deliver was made, provided you find upon the evidence it was a time when, by reason of the postponement agreed upon between the parties, the plaintiffs had a right to deliver, and made the offer to deliver in accordance with the terms of the contract, and the defendant thereupon refused to take the seed so offered."

These instructions were certainly misleading and confusing by reason of their very general and indefinite character, if not positively erroneous. As before indicated, an offer to deliver at any time prior to the expiration of the defendant's optional period would not suffice to put the defendant in default. The goods were to be delivered at defendant's option, and the offer must have been made either at some time when the defendant requested delivery, or at the expiration of the period if no request was made. The instructions are not clear upon this point, but might easily be misunderstood. Again, the instructions say that there must be an offer to deliver, "in accordance with the contract," at the defendant's place of business. This is certainly very indefinite. The plaintiffs had substantially admitted that there must be an offer of manual

delivery of the goods, but the evidence of the offers to deliver warehouse receipts was still in the case and before the jury, and they were not told, either expressly or impliedly, that such offers were ineffective, but were left apparently to draw their own conclusions as to whether such offers constituted offers to deliver in accordance with the contract or not. These points were fully and quite fairly covered by the first, second, and third instructions requested by the defendant and refused by the court. Here, however, arises a question as to whether any proper exceptions have been preserved to the refusal of the court to give the instructions asked for by the defendant. It appears by the bill of exceptions that the defendant submitted in due time twenty-one written instructions, all of which were refused. The bill of exceptions recites, immediately after the judge's charge, the following: "The jury having gone out, the defendant's counsel in open court made the following exceptions, which were noted down by the reporter as follows, which exceptions the defendant's counsel had asked leave to file before the jury retired: . . . The defendant now excepts to the refusal of the court to give the first instruction proposed by the defendant; the same of the second, third," etc. (naming all of the requested instructions by number). "The jury, after deliberation, returned into court with their verdict, which is of record, wherein," etc. The respondents' claim is that these exceptions to the court's refusal to instruct were not taken before the jury retired, and hence are not available upon appeal. We can hardly approve of this method of throwing upon this court the duty of determining whether exceptions were properly taken or not. It is the function of the bill of exceptions to state what exceptions were properly reserved upon the trial, and it is the duty of the trial judge to settle the bill. However, as the question is fairly presented for decision, and is one of considerable importance, we have concluded to determine it.

The common-law rule, as generally stated, was that exceptions to instructions or refusal to instruct must be taken at the trial in order to be available. Our statute (sec. 2869, R. S. 1878), however, changed this rule as to exceptions to instructions actually given by the court so that they could be taken at any time during the term, but left exceptions to refusals to charge to be governed by the old rule. *Firmeis v. State,* 61 Wis. 140, 20 N. W. 663. The question is whether this common-law rule means that the exception must be taken before the jury retires, or will it be sufficient if taken at any time before the trial is closed by the rendition of the verdict. The language most frequently used in stating the rule is that the exception must be taken at the time or at the trial. Such is the expression used in the following cases in this court: *Jenks v. State,* 17 Wis. 665; *Firmeis v. State, supra; Thrasher v. Postel,* 79 Wis. 503, 48 N. W. 600; *Adams v. McKay,* 63 Wis. 404, 23 N. W. 575; *Stuckey v. Fritsche,* 77 Wis. 329, 46 N. W. 59. In *Kerslake v. McInnis,* 113 Wis. 659, 89 N. W. 895, is was said that the exceptions were too late, because not taken until after the verdict. There are two cases, however, which use different language, and which seem to afford some foundation for the respondents' contention. In *Nicks v. Town of Marshall,* 24 Wis. 139, the exceptions were taken after the verdict was rendered, and hence were too late under any construction of the rule; but in discussing the question it was said that justice would be best subserved by requiring exceptions to be taken when the charge is given, while there is still an opportunity to correct them, "than by deferring the exceptions *until the cause has been submitted to the jury.*" And in *Little v. Town of Iron River,* 102 Wis. 250, 78 N. W. 416, it was said that exceptions to refusals to charge must be taken *"on the trial, usually before the jury retires."* The authorities cited in support of this latter statement are the cases of *Firmeis v. State, Adams v. McKay, Stuckey v. Fritsche,* and *Thrasher v. Postel, supra,* none of

which go any further than to state that the exceptions must be taken at the trial. Looking outside of our own state, we find that the expression most frequently used in other courts is that exceptions must be taken "at the time," or "immediately," or "at the trial." Such is the case in *Rawlins v. Tucker,* 3 Iowa 213; *Moore v. Ross,* 11 N. H. 547; *Tagg v. Miller,* 10 Neb. 442, 6 N. W. 764; *Dozier v. Jerman,* 30 Mo. 216. It is true that in *Life & Fire Ins. Co. v. Mechanics' Fire Ins. Co.* 7 Wend. 31, it was said that an exception to the charge after the jury had withdrawn came too late, but no authority is there cited to the proposition. We also find it stated in 8 Ency. Pl. & Pr. 271, that "exceptions must be taken at the time of the refusal, and before the jury retires." In support of this proposition are cited *Dozier v. Jerman, supra; Tagg v. Miller, supra; Shepherd v. State,* 36 Fla. 374, 18 South. 773; *Reed v. Call,* 5 Cush. (Mass.) 14; and *Branton v. O'Briant,* 93 N. C. 99,—none of which cases say anything about the exception being taken before the jury retires, except the last one named, which simply holds that, where instructions were desired, they "should be asked before the rendition of the verdict, and, in strictness, before the retirement of the jury." From the investigation which we have been able to give the question, we do not find that there was at common law any strict unyielding rule requiring such exceptions to be taken before the jury retires, nor do we perceive that any such technical rule is necessary in the administration of justice. The reason of the rule requiring exceptions to be taken at the trial and before verdict is simply that the mind of the court should be called to the alleged error while there is still opportunity to correct it. This reason is fully subserved by the requirement that the exceptions be taken at any time before verdict, because the judge has power at any such time to call the jury before him, and correct the charge, if he be convinced of error. In cases where many instructions have

been asked and refused, it would often be practically impossible for counsel to take his exceptions before the retirement of the jury, unless the court should retain the jury in their seats for the purpose; thus greatly delaying the transaction of the business of the court, not only in that case, but in others to follow. We conclude, therefore, that exceptions to refusals to charge fully subserve their purpose, and are in due time, if taken after the retirement of the jury and before verdict, and hence that the exceptions in the present case are effective.

This conclusion renders necessary some consideration of the instructions asked by the defendant, which the court declined to give, and did not incorporate in his charge as given. These instructions were all directed to the first question of the verdict, and were twenty-one in number. It is not deemed necessary to recite at length all of these instructions, especially in view of the fact that we have held that the question to which they were directed was an improper question, and hence the issues will be presented in a different manner upon a new trial. Generally, we may say that the following ideas, expressed in these instructions, should have been in some form given to the jury: (1) That the proper method of delivery under the contract was by tendering actual delivery of the property at the defendant's place of business, this having been practically conceded by the plaintiffs upon the trial, and hence that an offer to deliver warehouse receipts was not a compliance with the contract; (2) that, if the time of delivery was extended by agreement of the parties, there must be a new offer of delivery at the close of such extended time in order to put the defendant in default; (3) that, if there was no extension of the period of delivery after March 15th or 16th, then it was not due diligence to wait until March 26th before attempting to make a resale, it appearing that the market was a falling one, and the season nearly over; (4) that, if a *bona fide* responsible offer for the seed was made to the plaintiffs, and

refused at a higher price than that finally obtained, then the resale was not made with due diligence. All of these propositions were contained in the refused instructions, and all of them seem to have been correct principles applicable to the case.

In addition to these instructions, there was one requested to the effect that, if there was a general custom among seed dealers in Milwaukee not to accept chamber of commerce weights, then an offer to deliver seed at defendant's store according to weights derived from the chamber of commerce scales is not a valid offer of delivery. The consideration of this instruction involves also the consideration of a ruling upon evidence. It appears that the seed was weighed by the plaintiffs upon the chamber of commerce scales, and that the bill was made out and payment requested by plaintiffs according to such weights. It also appears by defendant's testimony that Mr. Reel objected to accepting such weights, and demanded that the seed be weighed at the defendant's store, and in connection with this testimony the defendant offered evidence tending to show that there was a general trade custom among seed dealers in Milwaukee not to accept chamber of commerce weights on sales of such seed, because they were inaccurate, as they did not weigh to the pound. This evidence was objected to, and excluded. We think the ruling was erroneous. The contract is silent as to where the seed should be weighed, and the contract should be construed according to the uniform trade custom in this regard, if one could be shown. What is said in the former opinion upon the general question of the evidence of trade customs where a contract is ambiguous or indeterminate is sufficient on this point. It follows, of course, that, if the evidence should have been admitted, an instruction upon its effect should also be given if the question arises again.

In charging the jury on the subject of the credibility of witnesses the court gave the following instruction:

"If you find any witness in this case has sworn falsely as to any material point in the case, you are at liberty to reject the entire testimony of that witness, except as it may be corroborated by other credible witnesses, or by facts and circumstances."

This was erroneous, because it omitted the element of wilful false swearing. This subject has been so recently discussed in this court that no further comment is necessary here. *Lanphere v. State,* 114 Wis. 193, 89 N. W. 128.

Another inaccuracy in the charge, though not excepted to, may properly be noticed. In charging upon the subject of damages the court said that the proper rule is the difference between the contract price and the sum which the plaintiffs could have obtained by due diligence after defendant's refusal. The true rule is that in case of the breach by the vendee of an executory contract of sale of goods by refusing to accept the same the measure of the vendor's damages is the difference between the market value of the property at the time of the breach and the contract price, and that the market value is fixed by a resale if the vendor exercises all reasonable diligence in the resale to secure the best price obtainable. *Pratt v. Freeman & Sons Mfg. Co.* 115 Wis. 648, 92 N. W. 368.

While other questions are discussed in the briefs, it is believed that what has been said in this opinion will furnish a sufficient guide in the retrial of a case which, in its essence, is very simple.

By the Court.—Judgment reversed, and action remanded for a new trial.

STEPHENSON, Executor, Appellant, vs. AGRICULTURAL INSURANCE COMPANY, Respondent.

SAME, Appellant, vs. LONDON & LIVERPOOL & GLOBE INSURANCE COMPANY, Respondent.

SAME, Appellant, vs. CONTINENTAL INSURANCE COMPANY, Respondent.

SAME, Appellant, vs. PRUSSIAN NATIONAL INSURANCE COMPANY, Respondent.

December 17, 1902—January 13, 1903.

Fire insurance: Standard policy: "Loss": "Amount of the insurance": "Amount of loss": Apportionment of loss: Co-insurers.

1. Under sec. 1941—43, Stats. 1898, providing that, by the standard fire policy of Wisconsin, the property covered is insured against *loss* to an amount "not exceeding —— dollars," the word "loss" is used, not as a limitation upon the amount of the insurance, but primarily as a limitation of the liability.
2. Under the standard fire policy of Wisconsin (sec. 1941—43 to sec. 1941—62, Stats. 1898), "the amount of the insurance" is the maximum amount of the risk assumed—the face of the policy.
3. Under said standard fire policy the "amount of loss" is the adjusted damage by fire to the property covered by the policy.
4. Under said standard fire policy the "amount of liability," as to any particular loss, is the amount of the adjusted damages properly apportionable to the policy.
5. Sec. 1941—43, Stats. 1898, prescribing the formal part of the standard fire insurance policy, enacts that the formal parts thereof shall provide for insurance against loss to an amount "not exceeding —— dollars," etc., and sec. 1941—58 provides that other formal parts of such policy shall contain provisions that the insurer shall not be liable for a greater proportion of loss than the "amount insured" shall bear to the "whole insurance." A policy on a Wisconsin standard form contained a provision that, in consideration of a reduced rate of premium, the assured agreed to maintain insurance to the extent of eighty per cent. of the value of the property, and "if at the time of fire the whole amount of insurance on said property shall be less than eighty per cent., this company shall, in case of loss or damage less than said eighty per cent., be liable for only such portion thereof as the amount insured by this policy shall bear

to said eighty per cent. of such actual cash value of such property." During the life of the policy, and while the insurance in force was less than eighty per cent. of the value of the property, the property was damaged by fire to an extent less than eighty per cent. of its value. *Held:*

(1) That the language of the policy indicated that the contracting parties understood the result of a failure by the assured to take out sufficient insurance to equal eighty per cent. of the cash value of the property would not be a reduction of the amount of insurance effected by the policy, but such a division of any loss apportioned to the face of the policy out of the whole insurance between the company and the assured, as would make him bear the burden that would otherwise be cast on it by his failure to take out insurance up to the limit specified.

(2) That in apportioning the loss as between the different insurers, the amount of insurance effected by the policy was its face; but as between the underwriter of that particular policy and the assured, the latter should bear, as co-insurer, any loss not regularly insured against by his failure to take out the full amount of insurance agreed upon.

6. Sec. 1943*a*, Stats. 1898, prohibits the issuance of any policy containing any provision limiting the amount to be paid in case of loss below the actual cash value of the property, if within the amount of insurance for which premiums are paid, and prohibits the use of any co-insurance clause or rider except under named conditions. Several standard form policies were issued on a building. The one issued by the M. company contained a clause, in effect, that, if the property were not kept insured up to eighty per cent. of its value, the insurer would be liable for only such portion of the policy as the amount insured therein should bear to such eighty per cent. The building was not insured up to eighty per cent. when a loss occurred. In an action against companies, other than the M. company, it was *held* that sec. 1943*a* did not apply, the policies sued on containing none of the prohibited features; that the circumstance preventing the assured from obtaining full indemnity was the M. company's policy, containing a limitation of liability pursuant to said sec. 1943*a*, and the assured's election thereby to carry part of the insurance himself.

7. Several standard form insurance policies were issued on a building. The one issued by the M. company contained a clause, in effect, that, in consideration of a reduced premium, insured agreed to keep in force insurance up to eighty per cent. of the cash value of the property insured, and, if he failed so to do, that the insurer in such policy should, in case of loss or damage

less than eighty per cent., be liable for only such portion thereof as the amount of insurance in force should bear to such eighty per cent. There was a loss of less than eighty per cent. at a time when the assured had failed to keep up insurance to eighty per cent. of its value. Action was brought against companies other than the M. company. *Held*, that the defendant companies must be held liable according to their contracts and no further; that the fact that the insured by his contract with the M. company had stipulated away his right to full indemnity and received consideration therefor, did not relieve the defendant companies, whose premium was fixed with reference to such portion of the loss as the face of their policies, respectively, bore to the whole insurance on the property, from full contribution.

APPEALS from judgments of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

Plaintiffs' testator took out insurance on a building situated in the city of Milwaukee, Wisconsin, as follows: *Agricultural Insurance Company* of Watertown, New York, $5,000; *Liverpool & London & Globe Insurance Company,* $5,000; *Continental Insurance Company,* $5,000; *Prussian National Insurance Company,* $2,500; Northwestern National Insurance Company, $5,000; Milwaukee Fire Insurance Company, $5,000; and the Milwaukee Mechanics' Insurance Company, $7,500,—the policy in the latter company, however, containing a provision requiring insurance to be kept upon the property to the amount of eighty per cent. of the actual cash value thereof, and providing that in case of a failure so to do, and a fire occurring, the liability under such policy, should be limited to the amount that would be apportioned thereto in the event of the full amount of insurance being carried. The language of the policy in regard to the matter was as follows:

"At the option of the assured, and in consideration of the reduced rate of premium charged for this policy, the assured hereby agrees to maintain insurance during the life of this policy, upon the property hereby insured, to the extent of eighty (80) per cent. of the actual cash value thereof, and it is mutually agreed that if at the time of the fire the whole

amount of insurance on said property shall be less than such eighty (80) per cent. this company shall, in case of loss or damage less than such eighty (80) per cent., be liable for only such portion thereof as the amount insured by this policy shall bear to said eighty (80) per cent. of such actual cash value of such property."

Other than that stipulation, all of the policies were alike. The form thereof was that of the standard policy of this state, one of the provisions being, in accordance with sec. 1941—58, Stats. 1898, as follows:

"This company shall not be liable under this policy for a greater proportion of any loss on the described property or for loss by and expense of removal from premises endangered by fire than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss may be provided for by agreement or condition written hereon or attached or appended hereto. Liability for re-insurance shall be as specifically agreed hereon."

While all the policies were in force the property insured was damaged by fire to the amount of $14,169.50. The actual cash value thereof, when the fire occurred, was $94,000. Default was made by some of the companies as to paying their respective proportions of the adjusted loss. Suits were thereupon brought against them respectively as follows: Against the *Agricultural Insurance Company* for $2,319.33 with interest; against the *Liverpool & London & Globe Insurance Company* for the same amount; against the *Continental Insurance Company* for a like amount; against the *Prussian National Insurance Company* for $1,159.66.

The only issue made by the answers, litigated and required to be reviewed upon these appeals, is as to whether the total amount of the insurance on the building when the fire occurred was $35,000 or $30,546.53. In the complaint the latter amount was alleged to be correct, while in each of the

answers the former was insisted upon. Plaintiffs claimed that the $7,500 policy, so called, was in fact, by force of its limitation clause, reduced in proportion to the amount of the deficiency of insurance on the property under the eighty per cent. clause of the policy. Defendants claimed that the policy should be counted at its face, $7,500, in apportioning the loss. The trial court decided in favor of the latter view and ordered judgments accordingly, which were rendered, one against each of the companies. A separate appeal was taken from each of such judgments.

For the appellant there were briefs by *Cary, Upham & Black,* and oral argument by *E. L. Richardson.*

For the respondents there was a brief by *Van Dyke & Van Dyke & Carter,* and oral argument by *W. D. Van Dyke.*

MARSHALL, J. This appeal calls for the solution of two questions concerning the construction of significant words in this part of sec. 1941—58, Stats. 1898.

"This company shall not be liable under this policy for a greater proportion of any *loss* on the described property . . . than the *amount hereby insured* shall bear to the *whole insurance,* whether valid or not."

These are the questions: (1) Do the words "amount hereby insured" refer to the face of the policy,—the maximum amount of risk assumed under any and all circumstances? (2) Do the words "whole insurance" refer to the aggregate of the maximum risks assumed by all insurers in respect to the property? Affirmative answers will lead to an affirmance of the judgments.

Courts elsewhere have had the subject before us up for consideration to some extent. In respondents' favor we are referred to *Armour P. Co. v. Reading F. Ins. Co.* 67 Mo. App. 215, and *Farmers' F. Co. of New Jersey v. Scottish U. & N. Ins. Co.* 72 N. Y. Supp. 732. The language of the insurance contracts was the same, substantially, as here. In the first

case the effect of a provision like the eighty per cent. clause of the Milwaukee Mechanics' Insurance Company policy, as regards features of the contract similar to those of our standard policy, required by sec. 1941—58, Stats. 1898, was considered. It was to the effect that in case of a loss, the part apportioned to a particular company should be on the basis of there being insurance on the property to the extent of eighty per cent. of the cash value thereof, and if there was not that amount of insurance in fact, that the loss as to the deficiency should fall on the assured as a co-insurer. The court, in reaching a conclusion, seems to have ignored the plain language in that regard. It held that the liability of the company was the amount of the insurance under the policy; that the amount of the insurance was not the face of the policy, but the face scaled down in proportion to the failure of the assured to comply with the eighty per cent. clause; that the reduced amount was the proper sum to be considered in making up the "whole insurance" and in apportioning the loss between the several companies concerned so as to give the assured full indemnity for his loss within the range of the policies. That cast a burden on some of the companies which the assured expressly stipulated to bear himself, receiving a consideration therefor in the form of a reduction of the premium paid. In the second case the court held that the amount of the insurance was synonymous with the amount of the loss, and the latter synonymous with the liability; that a determination of the amount of the insurance necessarily waited upon the adjustment of the loss. "It might not be," said the court, "the maximum amount named in each of the policies. How much insurance was effected by each policy depended upon the sound value of the property covered at the time of the loss, diminished by twenty per cent." The policy contained a clause similar to that in those under consideration here, and required by sec. 1941—43, Stats. 1898, fixing the amount of the insurance at a sum sufficient to cover

all loss not exceeding a specified amount. The words "and not exceeding," etc., specifying the maximum amount of the risk assumed, inclined the court to hold that the true amount of the insurance was determinable only in the event of a loss. We cannot agree with that view. It seems to violate the plain meaning of the language of the policies. We will endeavor to show that such is the case.

In that part of the policy corresponding to sec. 1941—43, Stats. 1898, the word "loss" is used, not as a limitation upon the amount of the insurance, but primarily as a limitation upon the amount of the liability. That is obvious, since payment of one loss does not cancel the policy unless it equals the maximum amount of risk assumed. If it is less, it is only a *pro tanto* satisfaction of the policy. The company remains liable thereafter to be called upon time after time during the policy period, the policy being kept alive by compliance with its provisions, till an amount equal to the face thereof shall have been paid. It must follow that the amount of insurance effected by a policy is one thing, the amount of the loss in any particular instance another, and the liability to pay on account thereof another. The amount of the insurance is the maximum amount of the risk assumed, the face of the policy; the amount of the loss is the adjusted damage by fire to the property covered by the policy; the amount of the liability as to any particular loss is the amount of the adjusted damages properly apportionable to the policy.

What has been said as to what constitutes the amount of the insurance under that part of the standard policy, as regards sec. 1941—43, Stats, 1898, applies to that part embodying sec. 1941—58, Id. Note the plain distinction in the latter section between "amount hereby insured," or "whole insurance," and "loss:" "This company shall not be liable under this policy for a greater proportion of any loss . . . than the *amount hereby insured* shall bear to the *whole insurance.*" To say that the terms "liability," "loss," and "amount in-

sured," or "whole insurance," are synonymous, or that the amount of insurance is undeterminable in advance of loss, is well-nigh if not quite absurd. The language of the section as a whole is too plain to admit of any resort to rules for judicial construction to determine its meaning. As indicated, "loss" refers to the damages of the assured measured in money, "liable," or liability, to the amount of such loss which the sufferer under the insurance contract may recover upon the policy, and "amount hereby insured" to the risk assumed under the policy,—the amount which, regardless of any loss paid, remains subject to be drawn upon from time to time to satisfy other losses till it shall have been wholly exhausted.

The amount insured on the face of the Milwaukee Mechanics' Insurance Company policy is $7,500. It was not competent for such company to limit its liability so as in any way to vary the insurance contracts made by respondents. We are unable to see any evidence in its policy of an attempt to do so, or anything out of harmony with the conclusion we have come to. The policy contains the same language as the other policies respecting the risk assumed. It was limited to a particular sum, $7,500, coupled with a condition requiring the assured to carry insurance upon the property to the amount of eighty per cent. of the cash value thereof or to be deemed himself an insurer for the deficiency. That is the effect of the eighty per cent. clause. The maximum amount of its risk was $7,500. The amount of its liability, as between it and the assured, but not as between it and the other companies, was affected by the eighty per cent. clause. The language of the policy indicates that the contracting parties understood the result of a failure by the assured to take out sufficient insurance to equal eighty per cent. of the cash value of the property would not be a reduction of the amount of insurance effected by the policy, but such a division of any loss apportioned to $7,500 out of the whole insurance be-

tween the company and the assured as would make him bear the burden that would otherwise be cast upon it by his failure to take out insurance up to the limit specified. The words "amount of insurance" and "amount insured" are used in the eighty per cent. clause in a way to clearly indicate that they refer to the maximum risk assumed, the $7,500. Here is the language:

"If at the time of fire the *whole amount of insurance* on said property shall be less than eighty per cent., this company shall, in case of loss or damage less than said eighty per cent., be liable for only such portion thereof as the *amount insured by this policy* shall bear," etc.

There can be no mistaking the connection between the significant words in that clause and the maximum risk assumed by the company and by all the companies.

There is abundance of authority supporting the conclusions, that "amount hereby insured" and similar expressions as regards a particular policy, mean maximum amount of risk assumed; that "the whole insurance" and similar expressions as to any given parcel of property covered by several policies of insurance, with or without a limitation of liability clause similar to the one in the Milwaukee Mechanics' Insurance Company policy, mean the aggregate maximum risks assumed under all the policies; that such a limitation of liability clause in a policy does not operate to vary the terms of any other policy; and that the effect of such a clause, and the contractual purpose thereof, is to make the insured a co-insurer to the extent that he fails to place the whole insurance specified. We will mention in the main only cases cited by respondents' counsel. *Oshkosh G. L. Co. v. Germania F. Ins. Co.* 71 Wis. 457, 37 N. W. 819; *Liverpool & L. & G. Ins. Co. v. Verdier,* 35 Mich. 395; *Page v. Sun Ins. Office,* 74 Fed. 203; *Chesbrough v. Home Ins. Co.* 61 Mich. 333, 28 N. W. 110; *Haley v. Dorchester M. F. Ins. Co.* 12 Gray, 545; *East Texas F. Ins. Co. v. Coffee,* 61 Tex. 287; *Good v. Buckeye M.*

F. Ins. Co. 43 Ohio St. 394, 2 N. E. 420; *Bardwell v. Conway M. F. Ins. Co.* 118 Mass. 465; *Christian v. Niagara F. Ins. Co.* 101 Ala. 634, 14 South. 374. In the last case cited the court referred to the feature of insurance contracts making the assured a co-insurer as reasonable and one that should be enforced by courts rather than avoided by any attempt to read out of it a justification for a different course by rules of judicial construction. In *Chesbrough v. Home Ins. Co.* there was a limitation of liability clause similar in all respects to the one in this case, and the court treated the amount of insurance effected by the policy, in apportioning the loss between different companies, as the face thereof; but, as between such company and the assured, held that the latter should bear, as a co-insurer, any loss not regularly insured against by reason of his failure to take out the full amount of insurance agreed upon.

Our attention is called to language in sec. 1943*a*, Stats. 1898, prohibiting the issuance of any policy containing any provision limiting the amount to be paid in case of loss below the actual cash value of the property, if within the amount of insurance for which premiums are paid, and prohibiting the use of any co-insurance clause or rider except under certain conditions mentioned. We are unable to see how such section applies to this case. The policies issued by respondents were free from the prohibited features. They contain only features expressly required by the standard policy law. The circumstances preventing appellants from obtaining full indemnity were the Milwaukee Mechanics' Insurance Company policy, containing a limitation of liability clause pursuant to sec. 1943*a*, and the assured's election to exercise the option therein stipulated for, to carry a part of the insurance himself.

The claim is made that, taking the policies together, the assured was entitled to full indemnity, and language to that effect is quoted from *Sherman v. Madison Mut. Ins. Co.* 39

Wis. 104. This part of the argument of appellants' counsel is infirm in this: It fails to give weight to the fact that in the case cited the court held that the assured was entitled to full indemnity because that was what he paid for and did not stipulate away. Here the assured did stipulate that he would himself bear such part of the loss apportioned to $7,500 of the whole insurance as should not be collectible of the Milwaukee Mechanics' Insurance Company by reason of the co-insurance clause of its policy. To that extent he stipulated away the right to full indemnity and received the consideration therefor, as we have before indicated. That no part of such consideration went to enrich the respondents, makes no difference, since their own premium rates were made with reference to the clause of their policies limiting their liability to such proportion of any loss as the amount of the insurance taken by them respectively bore to the whole insurance on the property. They must be held liable according to their own contracts and no further, the same as was held in *Sherman v. Madison Ins. Co., supra.*

It follows from the foregoing that the question suggested at the opening of this opinion must be answered in favor of respondents, and the judgments appealed from affirmed.

By the Court.—So ordered.

RINZEL, Respondent, vs. STUMPF and another, imp., Appellants.

December 18, 1902—January 13, 1903.

Mechanics' liens: Fixtures: Confusion of lienable and non-lienable articles: Entire contract.

1. **The Wisconsin doctrine as to fixtures is: First, actual physical annexation to the realty; second, application or adaptation to the use or purpose to which the realty is devoted, and third, which is the principal consideration, the intention on the part of the person making the annexation to make a permanent accession to the freehold.**

2. Sec. 3314, Stats. 1898, provides that any person who furnishes materials or performs labor "for or in or about the erection, construction, repair, protection or removal" of any building shall have a lien therefor; and sec. 3315 gives such lien to a subcontractor on his complying with certain enumerated requirements. *Held*, that shelving of different lengths and widths, placed in the owner's building, by his order, so as to conform to the inside contour of the store, and toe-nailed to the walls and floor so as to make them stationary and permanent, sufficiently complies with the rule as to fixtures and supports a claim for a subcontractor's lien therefor.
3. Under said secs. 3314, 3315, tables placed in the store building for use in the prosecution of the business there to be carried on, but having no connection with or attachment to the building, do not become fixtures, so as to support a mechanic's lien.
4. Where lienable and non-lienable demands are charged in the same account, and there is no evidence indicating their respective values, the claim for lien cannot be supported under the rule that if the lienable articles can be readily ascertained from the account without a restatement thereof, the right to a lien is not impaired.
5. Where a material man makes an entire contract to furnish thereunder for a fixed sum lienable and non-lienable articles, a case is presented where the articles cannot be separated or apportioned so as to sustain a lien, and the claimant is not entitled thereto.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

On September 22, 1899, the defendants Stumpf & Langhoff entered into a contract with the defendant F. K. Markle Company, a corporation, to erect and construct for them certain shelving, counters, and tables, and place them in a building then being constructed for them on their premises, in the city of Milwaukee, for the sum of $1,678.50. Thereafter the Markle Company let the contract to the plaintiff, as subcontractor, to do a part of said work, and to manufacture said shelving, counters, and tables, for the lump sum of $867. During the progress of said work the plaintiff did extra work for said F. K. Markle Company amounting to $17.80. Prior to the commencement of this action said company paid plaint-

iff the sum of $500 on account. The court found that the plaintiff furnished the materials mentioned, which were placed in a building owned by Stumpf & Langhoff, and that the latter intended the same for their permanent and special use therein; that the articles so furnished were essential to the use for which they used the building; that they were specially adapted to the place where used; and that plaintiff had a mechanic's lien therefor. The court further found the giving of notice and the filing of a lien, and gave judgment for plaintiff for the entire amount claimed. The defendants Stumpf & Langhoff took issue with the material matters alleged in the complaint, and filed exceptions to the findings made. They also requested the court to make findings substantially to the effect that plaintiff's contract was an entire contract, for a lump sum; that it was not said defendants' purpose to make such shelving a permanent erection or addition to the freehold; that such shelving was but slightly attached to the building, and the tables were none of them attached to the building, except that two were glued around a center post. Due exceptions to the court's refusal to find were taken. Judgment in plaintiff's favor was duly entered, from which Stumpf & Langhoff take this appeal.

For the appellants there was a brief by *Doerfler, McElroy & Eschweiler,* and oral argument by *F. C. Eschweiler.*

For the respondent there was a brief by *Rogers & Mann,* and oral argument by *C. D. Mann.*

BARDEEN, J. The principal question to be determined on this appeal is whether the plaintiff is entitled to a mechanic's lien under the circumstances set out in the statement. Plaintiff was a subcontractor, and agreed with the principal contractor to furnish certain shelving and counters or tables which were placed in the appellants' building. His accepted proposition was to furnish the materials he did furnish for a

lump sum of $867. The defendants' contention is that none of said articles were of such a character as to give plaintiff a lien therefor. Sec. 3314, Stats. 1898, so far as is necessary to this discussion, provides that every person who performs any work or labor or furnishes any materials "for or in or about the erection, construction, repair, protection or removal" of any building shall have a lien therefor upon compliance with certain specified conditions. Sec. 3315 gives a subcontractor a lien upon giving notice, etc. These statutes have received a somewhat liberal construction in the interest of lien claimants. See *North v. La Flesh,* 73 Wis. 520, 41 N. W. 633. But all of the cases brought to our attention go upon the theory that the work done and materials furnished must enter into the "erection, construction, repair," etc., of the building upon which the lien is claimed. In other words, materials furnished and work done must become a part of the building, as between the parties, on the theory of becoming fixtures. This is the argument of respondent, and his brief is devoted to cases illustrative of the law of fixtures. What was said on the subject of fixtures in *Taylor v. Collins,* 51 Wis. 123, 8 N. W. 22, and approved in subsequent cases, establishes the law of fixtures as administered in this state. We restate the doctrine as follows. To become fixtures, there must be:

"First, actual physical annexation to the realty; second, application or adaptation to the use or purpose to which the realty is devoted; third, an intention on the part of the person making the annexation to make a permanent accession to the freehold."

To this may be added the proposition stated in *Homestead L. Co. v. Becker,* 96 Wis. 206, 71 N. W. 117, that "the matter of intention of the parties is held to be the principal consideration." This question of intention is chiefly important in contests between the grantee of the freehold and mortgage or lien claimants. In the case at bar the facts are but little in dispute. The appellants, who were owners of the building, and fitting it up for use as a clothing store, contracted for the

necessary shelving and counters or tables. The shelving was of different lengths and widths, and made to conform to the contour of the inside of the store. It was attached to the building by being toe-nailed to the walls and floor so as to make it stationary and permanent. It is probably true that it could have been removed without any serious injury to the building, but still we have actual, physical annexation, adaptation to the use of the building, and probable intent on the part of the owners to make the annexation permanent. The appellants argue that there is no evidence to support this last contention, but we think it follows as a just inference from all the circumstances in the case. We can readily agree with so much of the conclusion of the trial court as finds the shelving a part of the freehold. As to the tables mentioned, a different question arises. The evidence shows that twenty-four tables were furnished, all but two of them having no connection or attachment to the freehold. The element of attachment or annexation to the freehold in some way is one that cannot be ignored. In none of the cases called to our attention has it been held that mere loose, movable tables or floor furniture are fixtures. There must be actual annexation, or something which the law considers equivalent to it, to make an article a fixture. Nothing of that kind appears in this case. The appellants admit that the two tables glued around the post became a part of the realty. We hold, therefore, that twenty-two of the tables were not lienable.

It is suggested that, inasmuch as $500 has been paid on the contract, the court can still support the lien, on the view suggested in *North v. La Flesh,* 73 Wis. 520, 41 N. W. 633,—that where lienable and nonlienable articles are charged in one account, and the value of the lienable articles can be readily ascertained from the account without a restatement thereof, the right to a lien is not impaired. The trouble here is that there is no evidence presented in the bill of exceptions which enables us to fix the price of the tables or the

shelving. The bid of plaintiff was to do the work for a lump sum; hence, it not appearing how much the lienable and nonlienable articles were to cost, the judgment cannot stand.

But in this connection the further question is raised that the contract between plaintiff and the Markle Company being entire, and for a lump sum for lienable and nonlienable articles, the plaintiff has waived his lien, and cannot enforce any claim against appellants. This question has never been definitely determined in this state, although some features of it were discussed in *North v. La Flesh, supra.* The following language from *McMaster v. Merrick,* 41 Mich. 505, 2 N. W. 895, was quoted:

"It is also settled that one of the plainest cases of waiver is where privileged and unprivileged claims are mingled together in the same dealings, so that the lien is not kept ascertainable without restating and charging the accounts."

The court said, in substance, that they had no quarrel with this proposition, and that in a similar case would rule the same way. But the *North Case* was distinguished from the Michigan case on the ground that in the former case the lienable items in the account could be ascertained without restating the account. In a case very similar to the *North Case* the supreme court of Oregon used this language:

"Had the claim contained a lumping charge of the amount demanded, and there were no means of ascertaining from the notice itself the quantity and value of the lumber used in building the sidewalk, the lien would be defeated, . . . for a court cannot, from oral evidence, separate items for which a lien is given from those for which no lien can be acquired." *Harrisburg L. Co. v. Washburn,* 29 Org. 150, 44 Pac. 390.

In a later case the same court said:

"The rule seems to be that when lienable and nonlienable items are included in one contract for a specific sum, or are made the basis of a lumping charge, so that it cannot be perceived from the contract or account what proportion is charge-

able to each, the benefit of the mechanic's lien law is lost. In such case the court cannot, by extrinsic evidence, apportion the amounts of the entire charge or contract price between the lienable and nonlienable items." *Allen v. Elwert,* 29 Oreg. 428, 44 Pac. 823, 48 Pac. 54.

The syllabus to *Edgar v. Salisbury,* 17 Mo. 271, is in part as follows:

"When a demand is filed by a person seeking to avail himself of the act giving a mechanic's lien, services for which he might have had a lien are combined with other charges for which no lien is given, and the whole summed up in one item, so that it is impossible to ascertain from the account filed how much of the gross charge is a lien, the party will lose the whole benefit of the act."

This case was followed in *O'Connor v. C. R. R. Co.* 111 Mo. 185, 20 S. W. 16. See *Sweem v. A., T. & S. F. R. Co.* 85 Mo. App. 95; *Schulenburg v. Robison,* 5 Mo. App. 561; *Johnson v. Barnes & M. B. Co.* 23 Mo. App. 546. Another case uses this language:

"It is the inseparable blending of items for which the law gives no lien, because they are not lienable in their nature, with lienable items, which defeats the entire lien claim, and not the blending of lienable items, some of which remain unproved, or unproved to their full extent." *Schulenburg & B. L. Co. v. Strimple,* 33 Mo. App. 154.

The supreme court of Maine say that, where a laborer claiming a mechanic's lien has so intermingled his lien claim with non-lien items that the exact amount for which he is entitled to a lien cannot be ascertained, the whole lien must fail. *Baker v. Fessenden,* 71 Me. 292. See *Kelley v. Kelley,* 77 Me. 135. In a case in Illinois the contract with the lien claimants required the other party to pay a given sum for the entire labor agreed to be performed, only part of which was lienable. The court held the contract entire, and that a lien could not be enforced, for the reason that the statute only gave a lien for a part of the work, and the contract, being entire,

could not be apportioned, and the performance of it enforced in fragments. *Adler v. World's P. E. Co.* 126 Ill. 373, 18 N. E. 809. In *Morrison v. Minot,* 5 Allen, 403, the plaintiffs stipulated to do certain work and furnish certain materials for a building for a lump sum. The court said:

"The debt due them was for an entire sum, on the completion of their contract. That contract included materials for which there never was any lien, and it was an entire contract."

For these reasons the court held the plaintiffs could not maintain their suit. This case was followed in *Graves v. Bemis,* 8 Allen, 573, and in *Peatman v. Centerville L. H. & P. Co.* 105 Iowa, 1, 74 N. W. 689. Other cases along the same line might be cited, but enough have been referred to to show that a lien claimant circumstanced as the plaintiff has shown himself to be is not entitled to a lien. His contract is an entire one, for a fixed sum, and cannot be separated or apportioned so as to sustain a lien, even if a new trial were had.

By the Court.—Judgment as against the appellants is reversed, and the cause is remanded, with directions to enter judgment in their favor, dismissing the action.

LAWRENCE, Executor, Appellant, vs. BARBER and others, Respondents.

SAME, Respondent, vs. SAME, Appellants.

December 18, 1902—January 13, 1903.

Wills: Codicils: Construction: Executors: Duties under power of sale: Appointment of trustee: Intestacy: Bequests by implication: Presumptions: Evidence.

1. The will of testator devised his homestead to his four children. It further provided that all the residue of his estate should go to them in trust to sell and distribute to beneficiaries named.

By a codicil, made after the death of one child, he gave one-twelfth of his estate to the children of such deceased child, to be held for them in trust, and directed that immediately after his death his homestead be sold and the proceeds disposed of according to the terms of the will and codicil. The will appointed an executor, and appointed the testator's children as trustees to sell and distribute the residuum of the estate. Sec. 2128, Stats. 1898, provides that when a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution shall devolve upon the circuit court. *Held*, that sec. 2128 did not apply; that by the terms and provisions of the will the sale of the homestead was made a part of the administration of the estate, and, having appointed an executor, thereby the testator designated such executor to make such sale.

2. In such case, it was error to assume that the testator had omitted to designate by whom the power of sale was to be executed, and, by applying said sec. 2128 to the situation under said will, appoint a trustee to make such sale.

3. In such case, there was nothing in the will expressly giving the trustees, appointed to sell and distribute the residue of the estate, any right or authority over the homestead. *Held*, that the sale of the homestead being a duty to be performed by the executor as part of the administration of the estate, and the proceeds, when realized, being a part thereof, such proceeds should be paid and distributed, as personalty, directly to the beneficiaries named, and it was therefore error to direct the executor (appointed by the court trustee for the purpose of making sale of the homestead) to pay over the proceeds to the three children as trustees, to be by them immediately distributed.

4. Testator gave his homestead and household effects to his four children, and the residue of his estate to them as trustees for sale and distribution among designated beneficiaries. After the death of one child, he made a codicil by which he gave to the children of such deceased child one-twelfth interest "in all my estate, real, personal, and mixed." The codicil further provided that the homestead be sold, and that its proceeds be disposed of "according to the terms of my will and the provisions of the codicils thereof." *Held*, that the word "all" in the express command that the grandchildren were to have one-twelfth of all the estate, was too significant, definite, and unambiguous to warrant a construction that would deprive the grandchildren of one-twelfth of the proceeds of the homestead.

5. Where a decedent has left a will, the question whether intestacy exists as to any part of his estate, and the rights of his heir thereto, depends not upon whether the testator intended such situation to exist, or supposed it would exist, but whether he has, by his will, disposed of all his property.
6. In determining whether there is intestacy as to any part of a testator's estate, it is not absolutely imperative that express and unambiguous words of gift and designation of beneficiaries should be physically written in the will; it is sufficient that the court can find by necessary implication from the words used, that the testator had an intent that his property should go in a certain direction, and that he has so attempted to declare that intent.
7. The presumption that one who makes a will intends to dispose of all his property is not conclusive on the question of intestacy. In determining that question, it is not without weight in interpreting and construing the language used, and may be used to aid the court in understanding what was attempted to be expressed.
8. Testator gave his homestead to his four children, and the residue of his estate to them in trust for sale and distribution among the four children and another. One child having died, he made a codicil reciting that he desired to modify that portion of his will giving certain of his estate to the deceased son, one of the four, and did modify it by revoking all devises and bequests made to him. He then gave to the deceased son's two children a one-twelfth interest in all his estate, to be held in trust until their majority, provided, if either died during minority, that then a proportionate part of the devise should revert to the estate to be divided according to the provisions of the will and codicil. He expressly forbade the mother of the children from acting as trustee, and expressed a desire that none of his estate should, either directly or indirectly, pass to her or under her control. He also directed that his homestead should be sold immediately after his death, and the proceeds disposed of according to the terms of his will and codicil. In all other particulars he ratified his will. *Held:*

(1) That the last will of testator consisted not of one paper, but of the will and codicils together, and that they, interacting on each other, spoke his purpose that the entire estate should be divided between the five persons in the proportions named.

(2) That none of his estate was intestate property.

(3) That the grandchildren took their one-twelfth of the residuum of the estate subject to the trust created by the will.

(4) That the grandchildren had no interest in the question whether or not the trust was valid as to the interests of those who were at once trustees and beneficiaries, nor whether there was any merger as to such interests.

APPEALS from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Modified and affirmed.*

Petition by executor for construction of the will of Edward Barber, who died domiciled at Milwaukee December 7, 1901, leaving surviving him as heirs at law *Edward B., Benjamin C.,* and *Florence M. Barber,* children, and two grandchildren, children of his son Harry C. Barber, who died in August, 1899. The will, as probated, consisted of the original will, executed November 7, 1891; a first codicil of July 11, 1895, which merely changed the nomination of executor; and a second codicil, executed August 9, 1900. The original will disposed of the property as follows:

'First. To my daughter *Florence M. Barber,* my oil painting of myself. Second. To my son Harry C. Barber my crayon portrait of myself. Third. To my children Harry C., *Edward B., Benjamin C.,* and *Florence M. Barber,* all the rest of my household furniture, wearing apparel, and personal ornaments. Fourth. To my said children [naming the same four], their heirs and assigns, forever, my homestead. Fifth. All the residue of the estate, subject to debts, to my said children [naming the four], or such of them as shall survive me, and their survivors, in trust to sell the same or any part, in discretion, and meanwhile to care for, manage, and collect rents and profits, to distribute the net income annually, and the proceeds of sales within a reasonable time after such sales, as follows: Eleven-twelfth parts thereof to my said children [naming the four], equally, and the remaining one-twelfth part thereof to my stepdaughter, *Virginia C. Williams.* . . . The duration of the estate of my said children . . . as trustees as aforesaid shall not exceed the life of the survivor of my said two youngest children, namely, *Benjamin C. Barber* and *Florence M. Barber.* Sixth. All the rest, residue, and remainder of all my estate . . .

to my said children [naming the four], eleven-twelfth parts thereof, and to my said stepdaughter . . . the remaining one-twelfth part thereof. Seventh. In case of death of either child without issue, his share to pass to the others in the same manner as to him if living.'

An executor was named, other than the trustees, and the trustees were exempted from giving bond.

The second codicil, executed after the death of the eldest son, Harry C. Barber, recited that certain property had been devised and bequeathed unto him, and that he had since died, leaving surviving him a widow and two children, *Charles M.* and *Ruth E.*, and proceeded:

"Whereas, it is now my desire to modify that portion of my said last will and testament wherein and whereby I give, grant, devise, and bequeath certain of my estate to my said son Harry C. Barber: Now, therefore, I desire to, and do hereby, modify my said last will and testament in so far as the same relates to my said son Harry C. Barber by revoking and hereby do revoke all grants, devises, and bequests made in said last will and testament to my son Harry C. Barber; and I hereby grant to my grandchildren *Charles M. Barber* and *Ruth E. Barber,* children of my said son Harry C. Barber, and unto them together, share and share alike, an undivided one-twelfth (1-12) interest in and to all of my estate, real, personal, and mixed, it being my express intention that the two together shall receive an undivided one-twelfth (1-12) of my estate, and not an undivided one-twelfth (1-12) to each of said children, with this express provision: That, if either or both shall die before arriving at the age of twenty-one years, then upon such death or deaths, his or her share, or the whole thereof in the event of both dying, shall revert to my estate, to be divided according to the provisions of my last will and testament and the first and second codicils modifying the same. And I further direct that the said undivided one-twelfth (1-12) of my estate so devised and bequeathed to the said *Charles M.* and *Ruth E. Barber* shall be held in trust by a suitable trustee appointed by the county court of Milwaukee county, for the use and benefit of the said *Charles M.* and *Ruth E. Barber,* until they shall arrive at the age of twenty-

one years respectively, at which time the interest so devised and bequeathed shall be paid and turned over to each, respectively. In the appointment of the trustee I expressly prohibit the appointment of Lizzie Barber, mother of said *Charles M.* and *Ruth E. Barber,* as such trustee, it being my desire that none of my estate shall pass to, or under the control of, directly or indirectly, the said Lizzie Barber, wife of my said son Harry C. Barber. The crayon picture which I bequeathed to my son Harry C. Barber in my aforementioned last will and testament I give and bequeath to whichever of my sons *Edward B. Barber* or *Benjamin C. Barber* shall be successful in winning the same by the manner of drawing cuts. I hereby further modify my last will and testament by directing that immediately after my death my said homestead shall be sold, and the proceeds thereof disposed of according to the terms of my last will and the provisions of my said first and second codicils thereof. I, Edward Barber, hereby ratify and confirm my said last will and testament in every particular, excepting in so far as the same is modified by my first and this, my second, codicil thereto, and I hereby ratify and confirm all the provisions of my said first codicil."

The estate exceeded $100,000, and included a large number of parcels of real estate, apparently held by the testator for the purpose of sale, and not for use. The circuit court rendered judgment construing the will to give—First, the two portraits absolutely to the persons named; secondly, the household effects, library, etc., to the three surviving children, subject to the payment of one-twelfth of the value thereof, to be thereafter ascertained, to the trustee of the two grandchildren; third, that the homestead was ordered converted into personal property; that, no persons having been named to make such sale, *Abbott Lawrence,* the same person named as executor in the will, should be and was appointed trustee to make the same, subject to the approval of the court, and to pay the net proceeds to *Edward B., Benjamin C.,* and *Florence M. Barber,* the trustees named in the fifth paragraph of the will, for immediate distribution, one-twelfth thereof to the trustee of the grandchildren and eleven thirty-sixths

thereof to each of the three children of the testator. The judgment also provided that all the residue of the estate after payment of debts, expenses, etc., is required to be assigned to, and will thereupon vest in, said *Edward B., Benjamin C.,* and *Florence M. Barber,* and the survivors of them, as trustees, to sell, convey, and dispose of the same, and manage and collect profits, and pay and distribute the net income thereof annually, or oftener, and the net proceeds of the sale of the trust real estate, or any part thereof, within a reasonable time after such sale, to the persons and in the proportions following, to-wit: Ten thirty-sixths thereof to each of said children of the testator *Edward B., Benjamin C.,* and *Florence M. Barber,* one-twelfth thereof to *Virginia C. Williams,* and one-twelfth thereof to the trustee of the two grandchildren, for the use and benefit of said grandchildren, until they respectively arrive at the age of twenty-one years, at which time one-half of said one-twelfth is to be paid over to each of said grandchildren arriving at majority; but if either or both of said grandchildren shall die without issue before arriving at the age of twenty-one years, thereupon the share of either or both dying shall be paid over by said trustee of the grandchildren to the said *Edward B., Benjamin C.,* and *Florence M. Barber,* their personal representatives or assigns, in equal shares. It was further adjudged that all of the estate of the decedent is disposed of by his said will and codicils, and no part thereof or interest therein is to be considered or treated as intestate estate.

The plaintiff executor appeals from that portion of the judgment awarding all of the property above the one-twelfth to *Virginia C. Williams* and one-twelfth to the two grandchildren to the three surviving children, and from that part which adjudges that the homestead is to be sold by a trustee, and not by the executor in his capacity as such, and from that part which adjudges that the entire estate is disposed of by the will, and no part thereof intestate.

The two grandchildren, by their guardian *ad litem,* Robert N. McMynn, appeal from the whole of said judgment, except so much thereof as disposes of the two portraits, and so much as adjudges that the homestead be immediately sold, and the proceeds be treated as personalty, and awards to them one-twelfth thereof.

The three children of the testator appeal from those parts of the judgment which award to the grandchildren one-twelfth of the value of the household effects and that part which holds them entitled to one-twelfth of the proceeds of the homestead. All such appeals were heard together.

Joshua Stark, for the plaintiff.

For the defendants *Edward B., Benjamin C.,* and *Florence M. Barber,* there was a brief by *Quarles, Spence & Quarles,* attorneys, and *Charles Quarles,* of counsel; for the defendants *Charles M.* and *Ruth E. Barber,* there was a brief by *Robert N. McMynn,* guardian *ad litem,* and *C. H. Van Alstine,* of counsel; and the cause was argued orally by *Mr. Geo. Lines* and *Mr. McMynn.*

DODGE, J. 1. The principal error assigned upon the appeal of the executor is the holding by the circuit court that the sale of the homestead commanded by the second codicil was not to be performed by the executor in his official capacity as such, but by some trustee to be appointed by a court of equity; in accordance with which holding, *Mr. Lawrence,* who was in fact executor, was appointed such trustee, and was directed to pay the net proceeds to *Edward B., Benjamin C.* and *Florence M. Barber,* the trustees named in the fifth paragraph of the will, for immediate distribution, one-twelfth to the trustee of the grandchildren and eleven thirty-sixths to each of the three children. In this respect we are persuaded the circuit court erred. The authorities are numerous, and practically unanimous, that, where the sale of real estate is commanded by a will, obviously as a part of the settlement of

that estate within the province of the probate court, and preliminary to the final accounting and distribution, the implication, in the absence of anything to show a different intention, is that the executor selected by the deceased to administer said estate and to execute said will, is the person to perform such step, which is a part thereof. *Bogert v. Hertell,* 4 Hill, 500; *Meakings v. Cromwell,* 5 N. Y. 136; *Lesser v. Lesser,* 32 N. Y. Supp. 167; *Meehan v. Brennan,* 45 N. Y. Supp. 57; *Lindley v. O'Reilly,* 50 N. J. Law, 636, 15 Atl. 379. The court below apparently felt constrained to his conclusion by sec. 2128, Stats. 1898, providing that when a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution shall devolve upon the circuit court. The fault in the reasoning which would apply this section to the situation under the present will is in assuming that the testator had omitted to designate by whom the power of sale was to be exercised. The effect of the authorities upon the subject is that by directing such a sale to be made as a part of the administration of the estate, and naming a person to execute the will and administer that estate, by clear implication the testator does designate such executor as the person to perform the act. *Meakings v. Cromwell, supra.*

The further direction of this portion of the judgment that the proceeds of the homestead be paid over by the trustee making the sale to the three trustees named in the fifth paragraph of the will, to be by them at once divided, and paid over to the respective legatees, perhaps resulted from the error of the circuit court already pointed out, whereby he concluded that the sale was to be made outside of the ordinary administration of the estate, and by a specially appointed trustee, whence he conceived it necessary that the proceeds should come back into the estate in some way, and adopted this direction as a method of accomplishing that result. As already shown, this sale should be made by the executor in and as a

part of the administration of the estate, and the proceeds, when realized by him, are part of the estate,—doubtless personalty, on the doctrine of conversion resulting from imperative command to sell. Being such, there is no reason why the executor should not pay those proceeds directly to the persons to whom they are bequeathed, instead of adopting the circuity of procedure required by the judgment. There is nothing in the will expressly giving the trustees appointed by the fifth paragraph any right or authority over the homestead or its proceeds, and there is no necessity to involve them at all with reference thereto. Clearly, the whole purpose of the bequest is accomplished by directing the executor to pay the net proceeds of the homestead, one-twelfth to the trustee of the two grandchildren, and, in equal shares, to the three children of the testator, either thirty-three thirty-sixths or twenty-seven thirty-sixths, depending on whether or not there shall be found intestacy as to any portion of the homestead or its proceeds. Upon this assignment of error, therefore, the judgment must be modified to declare that the sale commanded shall be made by the executor in his official character, and the proceeds paid and distributed as personalty directly to the trustee of the grandchildren and to the three children of deceased.

2. The next question which is raised by assignment of error upon the appeal of the three children of the testator is whether the bequest contained in the second codicil, to the two grandchildren, of an undivided one-twelfth interest "in all my estate, real, personal, and mixed," extends to the household effects and homestead. The appellants alleging this error contend that it is apparent from the character of the property and from the general scheme of the codicil that the testator did not intend to give to these grandchildren an interest in anything except the residuum of the estate devised and bequeathed to trustees for realizing and distribution by the fifth paragraph of the will. While conceding that there are some circumstances which tend with more or less cogency to

this conclusion, we cannot deem them sufficient to overcome the express command that these grandchildren are to have the one-twelfth of all the estate. The word "all" in that connection is too significant, definite, and unambiguous to warrant us in entering upon the field of interpretation and holding that, instead of all, part only was intended. Further, such construction would render meaningless the direction of the codicil that the proceeds of the homestead be disposed of "according to the terms of my will and the provisions of the first and second codicils thereof." There are no provisions of such codicils having any relevancy, unless the gift of one-twelfth to the grandchildren applies to the homestead.

3. The next in natural sequence is the principal assignment of error and ground of appeal, assigned by the guardian *ad litem* of the two grandchildren,—for that the court held that there was no intestacy with reference to the portion of the estate which by the will had been given to Harry C. Barber, and by a revocation contained in the second codicil was prevented from passing, under the statute (sec. 2289, Stats. 1898), to his issue, and that by clear and necessary implication this portion of the estate, after deducting the one-twelfth by that codicil bequeathed to the grandchildren, was bequeathed to the three surviving children of the testator, the contention of these appellants being that the result of the revocation of the bequest to Harry C. left his one-fourth of the homestead and thirty-three one hundred forty-fourths of the other property intestate, except that one-twelfth of each of said shares was specifically devised by the codicil; that, as a result, the said minors, as heirs at law of the testator, were entitled to inherit one-fourth of these fractions, towit, one twenty-fourth of the proceeds of the homestead, and a slightly less fraction of the residuum of the estate devised by the fifth paragraph of the will to the trustees for collection and distribution. The preliminary and difficult question is, however, whether there is intestacy as to any part of the

estate, or whether there can be found in the words of the will and its codicils, read in the light of all the surrounding facts and circumstances, an implied devise or bequest of all of the estate to any one, and, if so, to whom. Much of the discussion is addressed to establishing the negative intention of the testator that there should be no intestacy, and that the two children of Harry C. Barber should receive nothing from said estate except the one-twelfth placed in trust for them upon a condition subsequent to revert in case of their death without issue before majority. There is but little controversy or doubt that the testator supposed and expected there would be no intestacy, and no share of his estate to pass to these grandchildren, except the specified one-twelfth. That is supported by a presumption that one who makes a will intends to dispose of all his property, and by many inherent probabilities disclosed by the will and codicils themselves, to be suggested later. But this is inconclusive. Intestacy and the rights of heirs depend not on whether the testator intended such a situation should exist, or supposed it would exist, under his will, but whether he has, by the will, disposed of all his property. The strongest of negative declarations on his part cannot serve to prevent either intestacy or rights of heirs at law. Those arise necessarily and by force of law, unless the testator has given all his estate to some one. If as to any portion of the estate we are unable to say that it is given by the will and the codicils, then intestacy results, no matter how averse the testator may have been thereto; and the right of the heir to his legal portion must be declared, however strenuous had been the testator's wish and purpose to cut him off. *Parsons v. Millar,* 189 Ill. 107, 59 N. E. 606; *O'Hearn v. O'Hearn,* 114 Wis. 428, 90 N. W. 450. On the other hand, it is not absolutely imperative that the express and unambiguous words of gift and designation of beneficiaries should be physically written in the will, in order that

the court may be able to find that the testator has thereby made donation. The doctrine of bequest by implication rests upon the proposition that courts may be able to find by the words used, not only that the testator had an intent that his property should go in a certain direction, but that he has so attempted to declare that intent and purpose that courts can find it by necessary implication from the words used. Schouler, Wills, § 561; Underhill, Wills, § 463 *et seq.; Earl v. Grim,* 1 Johns. Ch. 494; *In re Vowers' Will,* 113 N. Y. 569, 21 N. E. 690; *Masterson v. Townshend,* 123 N. Y. 458, 25 N. E. 928; *Powell v. McDowell,* 194 Ill. 394, 397, 62 N. E. 879; *Hand v. Marcy,* 28 N. J. Eq. 59; *Baker v. McLeod's Estate,* 79 Wis. 534, 48 N. W. 657; *In re Donges' Estate,* 103 Wis. 497, 79 N. W. 786; *Davies v. Davies,* 109 Wis. 129, 85 N. W. 201; *O'Hearn v. O'Hearn, supra.* The limitation on courts to merely construe the will made, and not to make such a will as they believe the testator wished, but did not make; to find in the words used an attempt to declare a given purpose, not to attempt to give effect to an actual, but wholly undeclared, purpose,—was not so carefully stated as it should have been in the opinion in *In re Donges' Estate, supra,* although the decision made in that case was distinctly within such bounds. The court there found in the limitation upon the wife's title and the condition upon which she was to take absolutely a clear attempt to declare testator's purpose that his children should take the real estate upon the contingency named. The duty of courts in raising devises by implication was accurately expressed in *O'Hearn v. O'Hearn,* 114 Wis. 432, 90 N. W. 451, thus:

"It is only admitted as a means of carrying out what the testator appears on the whole to have really meant, but failed somehow to express as distinctly as he should have done. In other words, a gift by implication must be founded upon some expressions in the will from which such intention can be inferred. It cannot be inferred from an absolute silence

on the subject. . . . The court cannot reform the will by changing its language, or add provisions not written therein. It can only construe the instrument as written."

The problem before us, therefore, is whether we can find in the words used by the testator, in either will or codicil, or all combined, an attempt to declare a gift to any one of the one-quarter of his estate which was given to Harry C. by the will as originally drawn. While, as we have already said, the clearest intention of the testator against intestacy or against the right of an heir at law to inherit any of the property is inconclusive, it is by no means without weight in interpreting and construing the language used. It is one of those attendant circumstances which serve to aid the court in understanding what was attempted to be expressed by the language used. The court may avail itself of that and the other circumstance to put itself as nearly as possible in the situation of the testator at the time when the words of the will were written (*Brittingham & H. L. Co. v. Manson,* 108 Wis. 221, 84 N. W. 183), to re-establish the light and atmosphere in which was painted the "picture of the mind" of the testator, as a will is sometimes called, so that it may appear to the reader as it did to the writer. We have already said that we think it very apparent that the testator did not wish nor intend to leave any of his property intestate, nor any to descend absolutely to his grandchildren. The whole scheme of the will and codicils shows this; but especially convincing is the declaration of the codicil that testator does not purpose that any part of his estate shall pass to or under the control of the mother of these grandchildren, directly or indirectly. That purpose will be thwarted if anything passes to them as intestate property, especially if either of them should die unmarried and intestate, so that the mother would take as heir of her child. Again, the provision for reversion to the estate of the share of either grandchild upon death during minority, for distribution according to will and codi-

cils, is utterly incongruous with the idea that a portion of that share, when it has reverted to testator's estate, immediately becomes repayable to the personal representative of the same deceased grandchild as intestate property. For these and other considerations it is doubtless our duty to read the will as attempting to dispose of the entire estate, but nevertheless we must be limited by the necessity of finding words therein capable, by construction, of indicating the testator's wishes as to such disposition. The mere revocation of bequest to Harry C., even accompanied by confirmation of all the rest of the will, probably would not, under the authorities, suffice to justify an implication of gift of that share to any or all the other beneficiaries. *Creswell v. Cheslyn,* 2 Eden, 123; *Ramsay v. Shelmerdine,* L. R. 1 Eq. 129; *Minkler v. Simons,* 172 Ill. 323, 50 N. E. 176; *Mason's Ex'rs v. Trustees,* 27 N. J. Eq. 47; *Harrington v. Pier,* 105 Wis. 485, 498, 82 N. W. 345. As this court has declared, however, precedents are of very slight utility in construing wills, for the reason that trifling differences of circumstances, verbiage, or context may wholly change their significance, give a different color to the instrument, and necessitate an entirely different conclusion as to testator's intent. *Swarthout v. Swarthout,* 111 Wis. 102, 108, 86 N. W. 558; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87, 97.

In the will before us, with its codicils, we certainly find more to indicate that testator at least supposed that he had used words declaring full disposal of all his property than in any of the cases cited in support of the conclusion of partial intestacy, and we should do wrong to blindly follow those precedents, if we can read out of those words the meaning which the testator attempted to write into them. One highly significant paragraph of the codicil is the direction that "immediately after my death my said homestead shall be sold, and the *proceeds thereof disposed of according to the terms of my last will and the provisions of my said first and second codi-*

cils thereof." The 'proceeds' are to be thus disposed of; not five-sixths thereof, leaving one-sixth to the law of descent or distribution. Now if, within the four corners of the will and codicils in combination, exist directions as to where shall go all of those proceeds, we should struggle to find them. Within that instrument are named but five persons whom the testator directs shall receive any share of those proceeds. They are *Edward B., Benjamin C., Florence M., Charles M.,* and *Ruth E. Barber.* Among these the expressed proportions are to *Charles M.* and *Ruth E.* one-twelfth shared, equally, and no more; to *Edward, Benjamin,* and *Florence,* in equal shares. Is it not reasonably implied that the last three take all except one-twelfth, or each eleven thirty-sixths? But, insists the guardian *ad litem,* by the original will only one-fourth is given to each of these children, and the codicil contains no gift of anything more. Such a construction, he argues, adds to the codicil what the testator did not put in it, namely, a gift of two thirty-sixths to each child. This insistence embodies a fallacy, though it is found in some of the cases cited. The will alone does not give one-fourth. It never became effective to give anything. The last will and testament of Edward Barber, deceased, consists not of one paper, but of three, and they, interacting on each other, speak his purpose as of the date of his death. It by no means follows, because certain phraseology used by the testator in 1891, under circumstances then existing, and in the context then adopted, would have resulted in devise of only one-fourth of the homestead to each child, that the same phrase used in 1900 or 1901 under different circumstances, and in different context, does not declare a gift of a different proportion. When the will finally took effect the written declaration of testator's purpose was that the entire proceeds of the homestead should be divided between the five persons above named, and that to two of them only one-twelfth should go. We think the gift of eleven thirty-sixths to each

of the remaining three is as necessarily implied, and the intent to that effect as plainly declared, as if stated in *hæc verba.* A similar implication with reference to the shares in the proceeds of the residuum to be realized by the trustees under the fifth paragraph of the will perhaps cannot be supported by such absolute and direct demonstration as that applied to the proceeds of the homestead, but the meaning of the phraseology used as to one bears on the testator's purpose in using similar expression as to the other. If by the language used with reference to the entire proceeds of the homestead testator intended to declare his will that all of such proceeds except one-twelfth should go in equal shares to his three living children, and supposed he had declared it, there is great probability that he indulged in the same intent and supposition when, by retaining them in 1900, he used similar and quite equivalent words to express his wishes as to the eleven-twelfths of the proceeds of the residuum. That these words were adopted in 1900 by the testator as declaring a full and complete disposal of all such residuum, and as naming all the persons who were to share therein, is strongly indicated by the clause in the codicil already mentioned, providing for reversion of the share of either grandchild dying a minor, and the division of that share "according to the provisions of my last will and testament and the first and second codicils modifying the same." This evinces the testator's understanding that he had designated in those documents the persons among whom was to be divided all of the residuum of the estate, and by process of reasoning similar to that applied to the homestead we can ascertain the only possible proportions consistent with a complete division. The beneficiaries are: First, the stepdaughter, one-twelfth; second, the two grandchildren, one-twelfth, and no more; and, third, *Edward, Benjamin,* and *Florence,* equally. The implication seems plain that the last three must take ten-twelfths between them, or ten thirty-sixths each. These conclu-

sions accord with those of the circuit court upon this branch of the subject, as embodied in its judgment, and the assignments of error predicated upon the decision as to the respective proportions of the litigants cannot be sustained.

4. The guardian *ad litem* of the grandchildren also assails as erroneous that construction of the will and codicils which holds that the share of the grandchildren in the residuum of the estate is controlled by the fifth paragraph of the original will, vesting all such property in trustees, to care for and dispose of the same, and to pay over to the beneficiaries the proceeds of such management and disposal. Instead thereof he contends that the codicil gives absolutely one-twelfth to the grandchildren, so that they take legal title to such share of each specific parcel of real estate at least, and not a mere beneficial interest in the proceeds. The policy and intent of the testator to vest the legal title to all this property in adult persons presumably familiar therewith, in order to facilitate its speedy sale and reduction to money, and avoid the delays and obstacles resulting from the necessity of consulting all the beneficiaries as to sale of each parcel and from the legal steps necessary to effect transfer of minor's interests, seems to us entirely plain. Such purpose would be thwarted by the construction suggested by the guardian *ad litem*. The trustees could make sale of only undivided eleven-twelfths without consent of those representing the grandchildren's interest. This, obviously, if it did not prevent sales, would impair the probability of obtaining full price for the fractional interest under the trustees' control. We find it impossible to believe in an intent to thus thwart and embarrass so well digested and so important a general plan as that set forth by the fifth paragraph of the original will, nor do we think the provisions of the codicil necessarily inconsistent therewith. The share of the father of these appellants, which might have passed to them but for the revocation, was merely a beneficial interest in the proceeds of the trustees' management, and the

purpose is obvious that the diminished share given by the codicil is intended to be conferred under the same restrictions. We are satisfied that the construction adopted by the circuit court was correct. This being so, these appellants can have no interest in the question whether or not the trust is valid as to the interests of those who are at once trustees and beneficiaries, nor in the inquiry as to whether there is any merger as to such interests.

Several suggestions are made by the guardian *ad litem* for certain modifications of the details of administration of this property, but they are all either so obviously perversive of the directions of the testator, or so entirely within the sound discretion of the trial court, that their discussion here may be dispensed with. Our conclusion is that the judgment of the circuit court is correct in all respects except with reference to the manner of sale of the homestead and disposition of the proceeds thereof.

By the Court.—The judgment of the circuit court is modified so as to declare it the duty of the executor, in his official capacity as such, to immediately sell the homestead of the deceased, and to pay the net proceeds thereof one-twelfth to such person as shall be appointed trustee for *Charles M.* and *Ruth E. Barber,* and eleven thirty-sixths thereof to each of testator's three children *Edward B., Benjamin C.,* and *Florence M. Barber;* and, as so modified, the judgment is affirmed. The taxable costs of the several parties in this court will be paid out of the estate.

KAMMERMEYER, Respondent, vs. HILZ and wife, Appellants.

December 18, 1902—January 13, 1903.

Equity: Reformation of receipt: Equitable issues: Special verdict: Findings: Evidence.

1. On the trial of an issue whether a written receipt for the payment of money should be reformed, so as to express that the amount paid was in full payment, settlement, satisfaction and discharge of any and all claims held by the receiptor, the verdict of the jury is merely advisory.
2. Where a special verdict taken on the trial of an equitable issue is adopted by the court it must be regarded as the findings of the court.
3. On the issue whether a written receipt for the payment of money should be reformed, so as to express that the amount paid was in full payment, settlement, satisfaction and discharge of any and all claims held by the receiptor, the evidence (stated in the opinion) is *held* to establish the right to such reformation.

APPEAL from a judgment of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Reversed.*

This action was commenced January 11, 1887, to recover $2,850, alleged to have been received by the defendants March 25, 1891, for the use and benefit of the plaintiff, under the following circumstances: The plaintiff is the daughter of the defendants, and was formerly known as *Kittie Hilz.* When she was about twenty years of age, she was begotten of a child by one A. W. Priest, a married man, in whose employ she was at the time. The child was born December 25, 1890. A short time afterwards the defendant *Adam Hilz* employed an attorney and threatened to bring suit against A. W. Priest for the seduction, whereupon, and on March 25, 1891, Priest settled with the defendants by paying to their attorney $3,000. The attorney retained $150, and paid the balance of $2,850 to the defendant *Adam Hilz,* who at the same time and in consideration therefor agreed with Priest in writing to bring up,

maintain, educate, clothe, and support the child, and save Priest harmless from all claims on account thereof, and gave a bond to secure such agreement. The child died in June, 1901. December 7, 1893, *Kittie* was married to Kammermeyer. In the winter of 1895 the plaintiff made demand upon the defendants for the money so received by them from Priest, and thereupon, and after some negotiations, and on March 23, 1895, the defendants paid to the plaintiff $600, and took from her a receipt in the words and figures following:

"$600 Milwaukee, Wis., March 23, 1895.

"Received from *Adam* and *Catharine Hilz* six hundred dollars ($600), being in full payment of any claim which I have or may have after their death as heir.

"MRS. KATIE KAMMERMEYER."

Nearly two years afterwards the plaintiff commenced this action to recover the whole of the $2,850, with interest from the time of making such demand. The defendant *Adam* answered by way of admissions, denials, and counter allegations, alleging the settlement with Priest, a counterclaim for expenses for and in behalf of the plaintiff, and the settlement with her of March 23, 1895, by paying the $600 and taking the receipt mentioned. The defendant *Catharine* answered, and denied having received any of the money. Such issues were tried, and as a result of the trial the jury found by special verdict, among other things, that of the $2,850 the defendants were entitled to $520 and the plaintiff to $2,330. The judgment entered thereon was reversed by this court May 15, 1900, and the cause was remanded for a new trial. 107 Wis. 101, 108, 82 N. W. 689. Upon the *remittitur* being filed, the defendant *Adam,* by leave of the court, amended his answer and counterclaim therein, among other things, by alleging, in effect, that the receipt by mutual mistake and misunderstanding failed to embody the agreement upon which the $600 was so paid March 23, 1895; that by the terms of

that agreement the $600 was to be a full payment, settlement, satisfaction, and discharge of any and all claims which the plaintiff had or might have in any portion of the $2,850; and that the receipt was intended to be drawn and was supposed to have been drawn so as to express such agreement, but that the scrivener had failed to so draw the receipt; and asked and demanded that such receipt should be reformed so as to express the true agreement, and so as to read as follows:

"$600. Milwaukee, Wis., March 23, 1895.

"Received of *Adam* and *Catharine Hilz* the sum of six hundred dollars ($600) in full payment, settlement, satisfaction, and discharge of any and all claims which I have or may have in any portion of the $2,850 received by *Adam Hilz* from A. W. Priest for his and my benefit.

"Mrs. Katie Kammermeyer."

The plaintiff, by way of reply, put in issue such equitable counterclaim. At the close of the trial the jury returned a special verdict, wherein they found, by direction of the court, in effect, the payment of the $3,000 by Priest, March 25, 1891; the giving of the receipt therefor, signed by the plaintiff and the defendants; and the contract of that date between the defendants and Priest, mentioned. The jury further found, in effect: (2) That of the sum mentioned Priest paid $1,425 for the use of the plaintiff; (3) that the defendants had not established under their counterclaim set up in the answer any claim for expenses for which they are entitled to damages against the plaintiff; (4) that the plaintiff and defendants did not, on or just prior to March 23, 1895, enter into an agreement to settle for $600 the plaintiff's claim against the defendants for her portion of the $2,850 received from Priest; (5) that there was no mutual mistake in drawing the first receipt mentioned, and that receipt did not fail to express the true agreement between the parties, and there was no agreement that it should be a full release and satisfaction of the plaintiff's claim for such money; (6) that the $600 was not agreed and intended by the parties to be a par-

tial payment of the plaintiff's claim against the defendants thereon; (7) that the agreement actually reduced to writing March 23, 1895, expressed the intention of the parties, and the plaintiff intended thereby to release all claim and right as heir. Thereupon the court found the facts to be as in such special verdict of the jury set forth, which verdict was adopted by the court, and the several facts therein found specifically reiterated in effect. As conclusions of law the court found, in effect, that the defendants were not entitled to a reformation of the receipt first mentioned as prayed; that the plaintiff was entitled to judgment dismissing the equitable counterclaim set forth in the defendant's amended answer for reformation of the receipt. From the judgment entered upon such special verdict and findings of the court in favor of the plaintiff for $2,358.38 damages and $483.89 costs the defendants bring this appeal.

E. M. McVicker, for the appellants.

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood,* attorneys, and *J. B. Kemper* and *A. B. Whitman,* of counsel, and oral argument by *Mr. J. B. Kemper* and *Mr. Whitman.*

CASSODAY, C. J. When the case was here on the former appeal, it was presented as an action at law triable by jury. 107 Wis. 101, 82 N. W. 689. After the cause was remanded to the trial court on reversal, an equitable counterclaim was interposed to the effect that March 23, 1895, the defendants paid to the plaintiff the $600 mentioned in full payment, settlement, satisfaction, and discharge of any and all claims which the plaintiff had or might have in any portion of the $2,850 mentioned, and asked to have the receipt given therefor at the time reformed so as to express such agreement. Such equitable counterclaim was put in issue by a reply. The trial of that issue was for the court. Of course, it was competent for the court to take an advisory verdict of the jury, as

it did; but such verdict was not binding upon the court, as in an action at law. The special verdict was adopted by the court, and must be regarded as the findings of the court. The important question is whether such findings are against the clear preponderance of the evidence. It is undisputed that Priest paid the $3,000 March 25, 1891, to settle a suit then threatened against him by the defendants by reason of his getting their daughter, the plaintiff, with child; and that the terms of such settlement were in writing, signed by the parties. The plaintiff was a party to that settlement, and signed some of the papers. It is also undisputed that such writings were silent as to any portion of the money belonging to the plaintiff, unless it is to be inferred from the agreement on the part of the defendants to care for, bring up, maintain, educate, clothe, and support the child, and save Priest harmless from all claims on account of his being the father of the child. Priest testified, against objection, to the effect that it was understood at the time that the money was to be used to bring up and educate the child, and for the benefit of the plaintiff; that he "went there with the money to settle, and what" he "wanted was to be absolutely released from any further liability on account of this entire matter." Priest is contradicted in some respects by other witnesses, but it is obvious, even from the testimony of Priest, that a large portion of the money was to settle the claim made against him by the defendants, and to secure from them the agreement above mentioned. Assuming that the money was to be in part for the use and benefit of the plaintiff, still the question recurs whether the plaintiff's claim therefor was not fully settled, satisfied, and discharged by the payment of $600 made to her by the defendants March 23, 1895. The plaintiff made no claim to any portion of the money received by the defendants from Priest until more than a year after she was married, and nearly four years after the settlement with Priest. It does not just appear when she first made claim to the money,

or any part of it, from the defendants. The complaint alleges that she first demanded the money from the defendants January 30, 1895. She testified that she employed counsel to get the money. A letter in evidence to the defendant *Adam* from her attorneys dated February 12, 1895, is to the effect that she was not satisfied with his proposition to give her a lot worth $300 or $400; that she claimed *"half of the money,* $1,400;" and if he had not that amount on hand, and could not raise it on his property, she would, if he preferred, take "$600 in cash and a lot in North Milwaukee." Under date of February 26, 1895, the plaintiff wrote the defendants to the effect that she wanted them to let her "have $1,000 of the money" they had "received from Priest, and to settle this matter;" that, as the papers were written, she "would always have a right to prosecute, for" she "was allowed nothing at all." Soon after the plaintiff wrote to the defendants: "I agree to the $600. If you lost more than I did,—that the most of it belonged to you,—why, then, it is all right. However, I always thought differently, and the law, too, is different. *If the 'sin money'* brings you luck, well, we will see. Perhaps the time will come when you wish that you had acted differently." Under date of March 13, 1895, the plaintiff again wrote to the defendants, in effect, requesting them to let her know when they could give her the money, as it was wanted in a pending deal; that she would expect a "reply by the following Monday at the latest, for" they could "get the few hundred dollars any time;" that, if they put off the matter indefinitely, so that the pending deal came to nothing, then she would "not be satisfied with the $600"; that she was "acting square enough by showing" her "good will in agreeing to the little"; that she did not think the lawyers would "be satisfied with so small an amount"; that she looked "for an early reply as to when" they would give her the money. In pursuance of such negotiations the defendants paid the plaintiff the $600 March 23, 1895, and took the receipt first men-

tioned. It appears from the clear preponderance of the evidence that the amount so paid was to be in full payment, settlement, satisfaction, and discharge of any and all claims which the plaintiff had to any portion of the $2,850 which the defendants received from Priest, and the trial court improperly refused to reform the receipt so as to express the settlement so agreed to by the parties to this action. Such equitable counterclaim is clearly established by the clear preponderance of the evidence. It is unnecessary to repeat the evidence. This conclusion makes it unnecessary to consider any of the other numerous errors assigned.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with direction to sustain the equitable counterclaim, and to dismiss the action.

ILLINOIS STEEL COMPANY, Respondent vs. DETTLAFF and wife, Appellants.

December 19, 1902—January 13, 1903.

Service of summons: Sheriff's return: Impeachment: Evidence.

1. Where the sheriff's return on a summons certifies that one defendant could not be found, but that the sheriff served the summons on such defendant by delivering a true copy to his wife, a person of suitable age and discretion, etc., and also that he served the same personally on the wife by delivery of a copy, such proof of service is not overcome by affidavits of such defendant and his wife, made five years thereafter, that such service was not made, when it further appears that such defendant had made two prior affidavits entitled in the action, stating that he was a defendant therein, and asking in one for a substitution of attorneys, and in the other for leave to file an amended answer.
2. Where the sheriff's return upon a summons shows a legal service thereof upon the defendant, upon motion to set aside the service and vacate judgment entered in the action, the showing that no service was ever made must be "*most satisfactory.*"

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This is an action of ejectment, brought by the plaintiff to recover possession of a lot upon what is known as "Jones' Island," in the city of Milwaukee. It was commenced in September, 1897, at about the same time with a large number of other suits of the same nature by the same plaintiff against other persons living on the "island." The sheriff's return upon the summons is to the effect that *Andrew Dettlaff* could not be found, but that he served the same on said *Andrew* by delivering a true copy to —— *Dettlaff,* his wife, a person of suitable age and discretion, etc., and that he also served the same personally on said wife by delivery of a copy on the 10th day of September, 1897. In most, if not all, of the other actions of a like nature, answers were served by Mr. Rublee A. Cole, but in this action no appearance was made nor answer served by any one, and on the 4th day of November, 1897, judgment for the plaintiff was rendered by default. The remaining actions remained at issue without trial until February, 1899, when the various defendants, upon their own affidavits, obtained orders to show cause why Fiebing & Killilea should not be substituted as attorneys in place of Mr. Cole in the respective actions. In April, 1900, the defendants also obtained orders to show cause why they should not each be permitted to serve an amended answer setting up the statute of limitations as a defense. Each of these applications was made separately, and properly entitled in the several individual actions, but all were brought on for hearing at the same time. The defendant *Andrew Dettlaff* made an affidavit in support of each application, each of which was properly entitled in this case, and in each of which he swore that he was "one of the defendants in the above-entitled action," and also stated in the latter affidavit reasons why he should be granted the privilege of amending his answer. Upon the hearing it appears that the court's attention was called to the fact

that judgment had already been entered in this action, and the court declined to make any order in this action as was done in the other actions, but an entry was made by the clerk in his minute book to the effect that in the case of the *Illinois Steel Company* against Adrian and over "one hundred motions of the same kind" defendants' motions to amend their answers were heard and granted, the proposed amendments having been heretofore served and filed. The defendants' proposed answer was served on plaintiff's attorney April 13, 1900, and service admitted, and all the papers were filed. The defendants remained in possession of the premises, and thus the record stood until May, 1902, when the plaintiff desired the issuance of a writ of assistance in this action to put the plaintiff in possession, but could not obtain it from the clerk on account of the presence of the answer upon the files. Thereupon affidavit was made on the plaintiff's behalf showing the facts, and that no order was in fact made in this case, and asking that defendants show cause why the answer should not be stricken from the files, and a writ of restitution issued. Upon the hearing of this motion the defendants appeared, and the defendant *Andrew* filed his affidavit denying that any service of summons had ever been made on him, or that he had any knowledge of the entry of any judgment or the service of a summons therein, that he had been in adverse possession of the premises more than thirty years prior to September 10, 1897, and concluding with an affidavit of merits, but not denying or explaining his previous affidavits and motions. *Juliana,* his wife, also filed her affidavit, denying that the summons or complaint was ever served upon her. Upon these affidavits the defendants asked that the pretended service of the summons be set aside, and the judgment in the action vacated. Upon the hearing of the plaintiff's motion the defendants' application to vacate the judgment was denied, and the plaintiff's motion to strike out the amended answer was granted,

and the clerk was directed to issue execution as prayed by the plaintiff, and the defendants appealed.

For the appellants there was a brief by *Fiebing & Killilea* and *M. C. Krause,* and oral argument by *O. J. Fiebing.*

For the respondent the cause was submitted on the brief of *Van Dyke & Van Dyke & Carter.*

WINSLOW, J. The sheriff's return upon the summons showed a legal service thereof upon the defendants. An affidavit of default was properly made, and hence the judgment by default in November, 1897, was duly rendered. If in fact the summons never was served upon the defendants, that fact may be shown by motion in the action; and, if that motion be made in due time and upon sufficient proofs, the judgment may be set aside. Upon such a motion, however, the showing that no service was ever made must be "most satisfactory," in order to overcome the officer's return of service and justify the vacation of the judgment. *Carr v. Commercial Bank,* 16 Wis. 52; *Toepfer v. Lampert,* 102 Wis. 465, 78 N. W. 779. We cannot say that such a showing was made here. Granting that the affidavits of the defendants, standing alone, may be sufficient for that purpose, there are in the present case facts unexplained which tend to throw great doubt upon the statements, and to support the officer's return. These facts are the making and filing of the affidavits by *Andrew Dettlaff* in February, 1899, and April, 1900, in which he states that he is "one of the defendants in this action." These are certainly very persuasive indirect admissions by him that an action had been commenced against him to his knowledge, and the summons served upon him; and the significance of the admissions is not affected by the fact that the motions were made under a mistaken idea as to the condition of the action, or by the fact that the motion was denied. These admissions are entirely sufficient to justify the court in refusing to set aside the service of the summons and vacate the judgment. They strongly cor-

roborate the officer's return, and render the affidavits denying service unsatisfactory evidence. If, as we must hold, the proofs show that due service was in fact made, then the order of the trial court was plainly right,—no sufficient showing to excuse the default was made.

By the Court.—Order affirmed.

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BUTTLES, Appellant, vs. DE BAUN, Respondent.

December 19, 1902—January 13, 1903.

Trusts and trustees: Limitation of actions: Pleading: Cause of action: Trustees by operation of law: Repudiation of trust: Estates of decedents: Title to cause of action.

1. Trusts arising otherwise than by contract *inter partes*, trusts created by operation of law, whether implied, resulting, or constructive, and all trusts founded in contract having some of the elements of express trusts and properly referred to as such, though not belonging to that species of express trusts cognizable only in a court of equity, are subject to the statute of limitations.
2. A complaint alleged, among other facts, that defendant, acting as agent for plaintiff, sold land belonging to plaintiff and received the whole consideration, part of which defendant converted to his own use; that afterwards plaintiff consented to the retention of such sum on condition that defendant use it to pay a debt due by plaintiff to a third person. The complaint further alleged that such agreement of defendant was not kept, and that defendant at no time assumed any position inconsistent with being a trustee of such fund, but plaintiff failed to plead that the defendant had assented to the alleged agreement. *Held*, under the allegations of conversion, that defendant became a constructive trustee, or trustee by operation of law, and hence not within the judicial rule exempting express trusts from the operation of the statute of limitations.
3. In such case, the complaint further alleged facts showing that the conversion by defendant of the proceeds of the sale took place, and knowledge thereof was brought home to plaintiff, more than twenty years before the commencement of the ac-

tion. *Held*, that the use of the trust fund by the trustee for his own benefit, and in a way clearly inconsistent with the trust, was such a repudiation of the trust as brought it within the rule that the statute of limitations begins to run from the time when the repudiation of the trust is brought home to the person entitled to enforce it, and that therefore plaintiff's demand was barred.

4. In an action to recover a sum of money alleged to have been due plaintiff's husband, the complaint alleged that before the action was commenced he died leaving plaintiff "his only heir." *Held*, that the only way plaintiff could have become possessed of the cause of action was by a transfer thereof to her in the regular course of administration of her husband's estate, and no facts being alleged showing that such transfer ever occurred, a demurrer on that ground was properly sustained.

APPEAL from an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Affirmed.*

The following is the substance of the complaint: In 1873 plaintiff and defendant were married women living with their husbands, who were brothers, in Milwaukee, Wisconsin. Defendant's husband died in 1881. She is now the wife of James De Baun. At the time first mentioned defendant had a separate estate and was engaged in business on her own account. Plaintiff and her husband removed to Paris, France, in 1873, and there resided for about three years. At the time of such removal they owned real estate in Milwaukee, Wisconsin, to a considerable extent, which they left in charge of defendant and her husband as agents, with power to negotiate a sale of a portion thereof. Soon thereafter defendant exercised sole control over the premises, performing the service for the purpose of adding to her separate estate. During the time of such performance she negotiated a sale of the portion of the property mentioned, which was approved by plaintiff's husband and was consummated, the consideration, $2,700, being paid to defendant. She or her husband sent plaintiff's husband $1,700 of the money and retained the balance, assuming to own the same. Plaintiff's husband indicated to defendant assent to such retention upon condition of the

money being used to pay off a mortgage indebtedness owing by him to the Northwestern Mutual Life Insurance Company. Neither defendant nor her husband assumed any position thereafter inconsistent with their being trustees of the $1,000 fund, but they wholly failed to apply the same to the purpose of the trust. The husband died insolvent. Plaintiff collected of his estate on account of such fund $294.84. The balance is wholly unaccounted for. Plaintiff's husband died in 1884, leaving her as his only heir. As such, she owns the claim against defendant for the balance of said trust fund. She has no adequate remedy at law to recover the same.

The prayer of the complaint was for an accounting and for general relief and costs. Defendant, by her attorneys, demurred to the complaint: (1) For insufficiency; (2) because the action is barred by sec. 4227, Stats. 1898; (3) because it is barred by sec. 4222, Stats. 1898; (4) because plaintiff is not possessed of capacity to sue, in that the claim, if one exists, is in favor of the personal representatives of her husband, and no facts are alleged showing that it passed to plaintiff by assignment in the course of the administration of her husband's estate before this action was commenced. The demurrer was dismissed and plaintiff appealed.

For the appellant there were briefs by *Durant, Price & Cowen,* and oral argument by *Paul D. Durant.*

Glenway Maxon, for the respondent.

MARSHALL, J. The pleader attempted to set out a cause of action for an accounting by a trustee of an express trust,—that particular kind of an express trust that can only be dealt with in a court of equity, hence one not subject to statutes of limitations so long as there is no denial or repudiation of the trust. That the pleader failed to state facts sufficient to constitute such a cause of action is apparent from the most casual examination of the complaint. It states clearly that defendant and her husband, acting as agents for respondent's hus-

band, sold land belonging to him, receiving as the consideration therefor $2,700, $1,000 of which they converted to their own use. They thereby became constructive trustees, trustees by operation of law. The cause of action for the wrong was cognizable in a court of law, hence not within the judicial rule exempting express trusts from the operation of the statute of limitations. All trusts arising otherwise than by contract *inter partes,* trusts created by operation of law, whether implied, resulting, or constructive, and all trusts founded in contract having some of the elements of express trusts and properly referred to as such, though not belonging to that species of express trusts cognizable only in a court of equity, are subject to statutes of limitations. Perry, Trusts, § 865; *Kane v. Bloodgood,* 7 Johns. Ch. 90; *Boyd v. Mut. F. Asso. ante,* p. 155, 90 N. W. 1086, 94 N. W. 171. True, the complaint states that after the wrongful act of conversion mentioned in the complaint plaintiff's husband consented to the retention of the money by the wrongdoers on condition of their using the same when necessary in the payment of an indebtedness of plaintiff's husband to the Northwestern Mutual Life Insurance Company, but does not allege that they agreed to hold the same for that purpose. It is alleged that they at no time assumed any position inconsistent with their being joint trustees of the fund, but that falls far short of alleging that they agreed to hold the $1,000 as the property of plaintiff's husband under an agreement to finally dispose of the same for his benefit as suggested by him, that is, by applying the same upon his indebtedness to the Northwestern Mutual Life Insurance Company. If they failed to do anything to change their position as constructive trustees created by the conversion of the $1,000, as alleged in the complaint, that would warrant the allegation that they "never assumed any position with reference to the money inconsistent with their being joint trustees thereof." It follows that the demurrer based on the statute of limitations was proper.

If it were a fact that the complaint sets forth a cause of action for breach of an express trust subject to be dealt with only in a court of equity, still the complaint shows that plaintiff's claim is barred by the six-year statute of limitations, as it appears that the trust was repudiated to the knowledge of plaintiff and her husband more than six years before the commencement of this action. In any event, a repudiation of the trust, brought home to the knowledge of the person entitled to enforce it, started the six-year statute of limitations running. *Williams v. Williams,* 82 Wis. 395, 52 N. W. 429; *Taylor v. Hill,* 86 Wis. 99, 56 N. W. 738. A use of a trust fund by the trustee for his own benefit, or in any way clearly inconsistent with the trust, and conclusively evincing a repudiation thereof, is a repudiation of the same within the rule above stated. The complaint before us shows that defendant or her husband, or both, used the money in question as their own twenty years or more before the commencement of this action, and that their wrongdoing was brought home to the knowledge of the plaintiff's husband as early as about 1881, setting the statute of limitations running which extinguished the claim long before this action was brought.

There is another insufficiency in the complaint, in this: The cause of action against defendant, or defendant and her husband, accrued to plaintiff's husband and passed upon his death to his personal representative, not to the plaintiff as heir. The allegation in the complaint that plaintiff, as sole heir of her husband, owns the cause of action, in connection with what precedes it, we look upon as a mere statement of a conclusion of law to the effect that by reason of plaintiff being the sole heir of her husband the cause of action passed to her upon his death. We cannot, by the aid of all reasonable inferences in favor of the pleading, gather any other meaning therefrom. The only way plaintiff could have become possessed of the cause of action was by a transfer thereof to her in the regular course of administration of her husband's estate, and no facts

are alleged to show that such a transfer ever occurred. Facts may sometimes be sufficiently alleged by stating the same according to their legal effect, but in this case there does not appear to have been any attempt to do that. The pleader did not allege that such proceedings were duly had subsequent to the death of plaintiff's husband, that she, as sole heir, became the owner of the cause of action against the defendant, or allege anything to that effect. Looking only to the pleading, it appears that plaintiff relies for a title to her pretended cause of action solely upon the fact that she is the sole heir of her husband.

For each and all of the reasons above stated, the demurrer to the complaint was properly sustained. Other reasons for the same result, assigned in the brief of counsel for respondent, we do not consider necessary to discuss or pass upon.

By the Court.—The order is affirmed.

MATTESON, Appellant, vs. RICE, Respondent.

December 19, 1902—January 13, 1903.

Landlord and tenant: Warranty: Agency: False representations by agent: Authority of agent: "Scope of the agency."

1. A warranty is always a representation, but the reverse is not necessarily true, the first being a more comprehensive term.
2. A landlord authorized the janitor of his flat building to exhibit the premises to prospective tenants, execute leases, place the tenant in possession, and collect the first month's rent. The tenant was induced to enter into lease of a flat by the janitor's false assurance, not amounting to a warranty, that a wall, not open to inspection, between the flat leased and an adjoining building, was fire proof. The janitor had no express authority to make representations or warranties. *Held*, that the landlord was liable to the tenant for loss of goods by fire, the representations in question being so far within the scope of the business of the agency as to be deemed authorized.

3. The fact that the agent believed the representations to be true, and had no intention to deceive the tenant, would not affect the landlord's liability.
4. While an agent may not do everything his principal may do, where a representation by the agent directly appertains to and becomes a necessary part of the transaction under consideration, and an inducement to its acceptance by the party to whom the representation is made, it may be said that such matter falls "within the scope of the agency."

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is an action to recover damages suffered by plaintiff by reason of the alleged false and fraudulent representations of defendant's agent. The complaint sets out the facts substantially as hereinafter stated, and alleges that the representations made by the agent were made fraudulently, and for the purpose of inducing plaintiff to rent said flat. The case was tried before a referee, who made findings as follows:

"(1) That in 1897 the plaintiff leased a flat contained in a building belonging to the defendant, at or near the corner of Eighteenth street and Fond du Lac avenue, in the city of Milwaukee, and occupied the same as a tenant of the defendant under and pursuant to said lease until the building, including said flat, was destroyed by fire, in December, 1898, at which time all of plaintiff's property contained in said flat was destroyed.

"(2) That plaintiff made his contract or lease with one August Klempke, who was at that time the janitor of said flat building, and employed by the defendant, and that the entire business of leasing said flat to the plaintiff, on the part of the said defendant, was attended to and conducted by the said August Klempke.

"(3) That it was a part of Klempke's duties as an employee of the defendant to show the flats in said building to prospective tenants, to tell them the amount of rent charged for such flats, and, in case of acceptance by such prospective tenants of the terms offered, to put them into possession, collect the first month's rent, and pay it over to the defendant; the subsequent rent being paid to or collected by the defendant's bookkeeper.

"(4) Adjoining the said flat occupied by the plaintiff, and a part of the same building, was a store, also owned by the defendant. At the time the plaintiff rented said flat, he asked Klempke how it would be in case there should be a fire in said store; and said Klempke told him (plaintiff) that there was a fireproof wall between the said store and the flat about to be rented, and which was afterwards rented, by said plaintiff as aforesaid.

"(5) That the plaintiff relied upon said statement to the effect that there was a fireproof wall between said store and said flat, and believed the same to be true, and that he would not have rented the said flat, or continued to occupy the same, except for said statement, and except for his belief, induced by said statement, that there was a fireproof wall between said flat and said store.

"(6) That the partition wall between the said store and the said flat was not a fireproof wall, and was not a wall which could be considered a fireproof wall or a fire wall, in any sense in which such term or terms could reasonably be understood, but consisted of a single thickness of brick, between upright wooden supports.

"(7) That said Klempke had no intention of defrauding the plaintiff in making said statement as aforesaid, but believed the said statement to be true.

"(8) That said partition or wall between the said store and said flat was covered with plaster on both sides, and the true character thereof was not open to examination or inspection by the plaintiff.

"(9) That had there been a fire wall or a fireproof wall between said store and said flat, as was represented by said Klempke, the said fire probably could and would have been confined to the store building, and in that case the plaintiff's property contained in said flat would not have been destroyed.

"(10) That said Klempke was not expressly authorized or instructed by the defendant or any one else to make any warranties or representations in regard to said building, or as to the construction of any part thereof, and that the statements made by said Klempke in reference to the character of said wall were not known to the defendant until after said fire had occurred."

The referee's conclusions were that it was not within the scope of the authority of Klempke, as defendant's agent, to make any representation or warranties respecting the construction of the building, and that there was no liability on the part of defendant by reason of such representations. Judgment was ordered for defendant. A motion to modify such findings was denied, and the report was confirmed by the trial court. No bill of exceptions was settled and the case is brought here for review on plaintiff's appeal upon the pleadings and findings.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *C. F. Fawsett.*

For the respondent there was a brief by *Miller, Noyes & Miller,* and oral argument by *B. K. Miller.*

BARDEEN, J. An inspection of the complaint and findings discloses that defendant's agent, Klempke, made false representations as to the character of defendant's building. The plaintiff relied thereon. From the character of the building, it was impossible for plaintiff to ascertain the truth of such representations. Because the fact represented was not true, plaintiff suffered loss. Defendant's agent had authority to show the flats, make leases, put tenants in possession, and collect the first month's rent. He had no express authority to make any "warranties or representations" in regard to the construction of the building, and he had no intention of deceiving plaintiff, and believed the statement he made to be true.

It must be understood at the outset that we are not dealing with the question of the authority of an agent to make *warranties* for his principal. A warranty, if false, gives rise to an action on contract. That is not this case. If we understand the complaint, the plaintiff sues to recover damages because of certain false representations made by the defendant's agent. A warranty is a collateral undertaking by which

the warrantor *contracts* that certain facts in relation to the property are or shall be as he represents them. 28 Am. & Eng. Ency. of Law, 728. The same authority, on page 739, says:

"The terms 'warranty' and 'representation' are not synonymous. A warranty is always a representation, but the reverse is not necessarily true, the first being a more comprehensive term."

This case seems to have become divested of any element of contract, and turns upon the question whether the representations made by Klempke were within the apparent scope of his employment. An agent's authority to warrant, as said in *Westurn v. Page,* 94 Wis. 251, 68 N. W. 1003, must arise from express authority, or proof that the transaction is usually attended with warranty. Cases may and frequently do arise where the agent may have no authority to warrant, and yet, from the character of his agency, his principal may be held liable in tort for false representations made by him. This distinction may seem somewhat fine and inconsistent, yet it is nevertheless one amply recognized by the courts, and frequently enforced. It arises from the character and duty of the agent in relation to the particular business in his charge. The general liability of the principal is as stated in the late case of *Hoyer v. Ludington,* 100 Wis. 441, 76 N. W. 348, where the following language was used:

"There is no doubt of the general proposition that if an agent is employed to effect the sale of lands for his principal, and he does so by means of false representations in respect to the land conveyed, even without the authority or knowledge of his principal, the latter is chargeable with such fraud in the same manner as if he had known or authorized the same. *Law v. Grant,* 37 Wis. 548; *McKinnon v. Vollmar,* 75 Wis. 82, 43 N. W. 800; *Gunther v. Ullrich,* 82 Wis. 222, 52 N. W. 88. And this is especially so when the principal accepts and enjoys the benefits of the purchase. *Fintel v. Cook,* 88 Wis. 487, 60 N. W. 788. But even then 'the representation which is to bind the principal must be made in reference to the subject-matter of his agency; it must

be made while the agent is acting as such; and the making of such representation must be within the apparent scope of his authority.' Mechem, Ag. § 743."

In *Law v. Grant,* 37 Wis. 548, the rule in such cases was stated with great strictness. It was there said:

"If the agent effected it [the sale] by means of false representations or fraud of any other description, although without authority from the plaintiff to do so, and although the plaintiff was entirely ignorant that he had done so, the legal status of the plaintiff is precisely the same as it would have been had he made the false representations, or committed the fraudulent act to the same end, in person."

It seems to have been assumed that the acts done or representations made in that case were within the apparent scope of the agent's authority. The agent represented that valuable minerals had been found on the land. If the principal was bound by such representations, it is not difficult to see in this case that defendant was responsible for the representations as to the fire wall. The representation of the existence of such wall was one of the inducements that led the plaintiff to make the lease he did. In the one case the representation of a mineral discovery induced the sale, and in the other the representation of the existence of a fire wall induced the lease. The one seems to have been as much within the scope of the agent's employment as the other. The representation as to the existence of the fire wall referred to the safety and condition of the premises. If it existed, the fact was an inducement to plaintiff to make the lease he did. Suppose plaintiff had asked the agent whether the roof leaked or the plumbing was in good condition; would not the agent have had implied authority, from the fact that he stood representing the owner, to have made answer to such questions? The difficulty experienced in cases of this kind is as to the proper understanding of the phrase "within the scope of his agency." It cannot properly be restricted to what the parties intended in the creation of the agency. Nor

can the question be determined by the authority intended to be conferred by the principal. As stated in some of the cases, we must distinguish between the authority to make the representations which amount to a fraud, and the authority to transact the business in the course of which the fraudulent act was committed. Tested by reference to the intention of the principal, it might be conceded that the making of representations culminating in fraud was not within the scope of the agency; but, tested by the connection of the act with the property and business of the agency, we find a direct connection between such act and business, and that the act was done by virtue of the authority of the agent in the particular matter. See *Reynolds v. Witte,* 13 S. C. 5. The scope of the agent's authority reaches out, and permits him to do such acts and things as are directly connected with and essential to the business in hand. He may not do everything his principal may do, but where the matter in controversy directly appertains to and becomes a necessary part of the transaction under consideration, and an inducement to the acceptance of the deal by the party to whom the representations are made, then we may say that it falls "within the scope of the agency." If the principal had been present, showing his building, with a view of leasing, inquiries regarding the danger of fire, the condition of the plumbing, and the like, from the lessee, would have been perfectly natural and in accordance with ordinary business foresight. Any false answer material to such inquiries, and affecting the proposed tenancy, would have made the principal liable. Substitute the agent with authority to lease; how is the situation changed? The considerations mentioned were germane to the transaction. They operated as an inducement to the making of the lease, and the referee has found that, if the representations had not been made, the lease would not have been entered into. The fact that the agent had power to make the lease gave him authority to answer such ques-

tions regarding the nature and construction of the building as were not evident to the senses of a prospective tenant. Such authority arises from the nature of the transaction and the enforced reliance of the tenant upon the agent's answers. The fact that the agent believed such representations to be true, and had no intention to deceive the tenant, does not lessen defendant's liability. That question was settled early in the history of the jurisprudence of this state, and some of the cases are mentioned in *Davis v. Nuzum,* 72 Wis. 439, 40 N. W. 497. The subject is discussed in *McKinnon v. Vollmar,* 75 Wis. 82, 43 N. W. 800, where a sub-agent pointed out the wrong land to the purchaser, and where false representations were made as to the amount of timber thereon. In *Gunther v. Ulrich,* 82 Wis. 222, 52 N. W. 88, the agent of the vendors made a false statement as to the location of their lots, whereby the vendee was induced to purchase the same. The vendors were held liable for such misrepresentation by the agent, whether intentional or not. If an agent to sell has authority to point out the location of land he desires to sell, it is difficult to see why an agent to lease has not authority to describe the building and its surroundings which he desires to lease. See *Porter v. Beattie,* 88 Wis. 22, 59 N. W. 499; *Beetle v. Anderson,* 98 Wis. 5, 73 N. W. 560; *Krause v. Busacker,* 105 Wis. 350, 81 N. W. 406; *Hart v. Moulton,* 104 Wis. 349–359, 80 N. W. 599. As already suggested, such authority seems to fall naturally from the relation of the parties, the nature of the business intrusted to the agent, and the circumstances found by the referee.

In this view, the conclusions of the referee and the trial court were erroneous, and the judgment must be reversed. There being no bill of exceptions, and no finding as to the amount of plaintiff's loss, the court below is directed, if necessary, to take further testimony upon the subject, to determine the amount of such loss, and to enter judgment therefor for the plaintiff.

By the Court.—So ordered.

116 336
116 595

MEYER, Respondent, vs. THE MILWAUKEE ELECTRIC RAILWAY & LIGHT COMPANY, Appellant.

December 19, 1902—January 13, 1903.

Street railways: Negligence: Injuries to passengers: Instructions to jury: Proximate cause: Appeal and error: Harmless error: Questions reviewed: Evidence: Credibility of party: Remarks of counsel: Excessive damages.

1. In an action for personal injuries, an instruction to the jury defining "proximate cause" as the "direct and natural," and the "direct and producing cause without the existence of which such injury would not have occurred," is incorrect. It is not essential that the negligence complained of should be the direct cause of the injury. It is sufficient that it is the natural and probable cause, from which an ordinarily prudent and intelligent person ought, in the exercise of such intelligence, to have foreseen that an injury might probably result from the alleged negligence under like circumstances.
2. In an action for personal injuries happening through the alleged negligence of defendant, an instruction on the question of proximate cause, in substance, that the injury resulting from the negligent act must be such as a person of ordinary intelligence and prudence *would*, in the light of the surrounding circumstances, have reasonably foreseen as the probable result of such want of care, criticised. The expressions "*ought*," "*should*" or "*might naturally*" in place of "*would*" are more accurate and ought to be used.
3. In such case, instructions declaring the necessity that the ordinarily intelligent and prudent man ought to have foreseen not alone that some injury, but "*such injury*" as in fact resulted, states the rule governing proximate causation too stringently. It suffices to charge a person with liability for a negligent act, if some injury to another ought reasonably to have been foreseen as the probable result thereof by the ordinarily intelligent and prudent person under the same circumstances, even though the specific injury might not be so foreseeable.
4. In an action for personal injuries caused by alleged negligent acts, instructions requiring the jury, in order to ascribe the injury to defendant, to go further than the law requires, are not prejudicial on defendant's appeal.
5. Error alleged in respect to instructions to the jury cannot be considered where no exception thereto is reserved.

6. In an action against a street car company for personal injuries alleged to have been caused by defendant's negligence, the defense of contributory negligence in attempting to board the car before it had stopped was interposed. In submitting to the jury the special question of plaintiff's contributory negligence, the court, in its instructions thereon, referred the jury, without repeating, to the definitions of ordinary care and proximate cause already given. No other negligence of plaintiff was suggested by any of the evidence in the case, nor was there any request for finding by the jury upon any other phase of negligence attributable to plaintiff. *Held*, that error in that respect, if any, was cured by the answer of the jury to another question of the special verdict, finding that plaintiff did not attempt to board the car while in motion.
7. It is not error to inform the jury at whose request certain instructions are given. Such practice is, however, disapproved.
8. A requested instruction that the jury, in determining the credibility of the plaintiff, may consider the motive he had to testify in his own favor, is properly modified by striking out from the requested instruction the clause, "and you should especially remember how far he is contradicted by disinterested witnesses upon the most material matters."
9. Improper remarks by counsel cannot be the basis of reversal where the record fails to show that such remarks were objected to, or opportunity given counsel to withdraw them, or the court to rule thereon, or that any exception is reserved.
10. Remarks of counsel bearing on the question of damages, objected to, but promptly withdrawn, and jury instructed to disregard them, reviewed and *held* to be innocuous, or their injurious effect, if any, cured by the remission of $1,500 from a $3,500 verdict.
11. Plaintiff, a skilled mechanic, forty-five years of age, suffered an injury from which he was confined seven weeks, and had been unable to fully perform the labors of his trade thenceforward. There was testimony of his medical attendant, undisputed, that complete recovery was hardly possible. *Held*, that a verdict of $2,000 was not excessive.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action for personal injuries claimed to have been received by plaintiff while attempting to board a car of the defendant, which, as he claims, had come to a full stop a short distance

from the street crossing, and which was suddenly started as he had hold of the same with his hands and was raising his foot to step up, thereby throwing him to the ground, bruising him, dislocating his shoulder, and causing fracture in the shoulder joint, by which the use of his arm was permanently disabled; he being a tinsmith, forty-five years of age. The principally disputed question, other than the amount of damages, was whether the car had stopped at the time he attempted to board the same. A special verdict was taken, wherein the jury found that the car was standing still at the time of such attempted boarding; that it was suddenly started by the defendant's servants while he was making that attempt; that both the motorman and the conductor were guilty of a want of ordinary care in so starting the car; that such want of ordinary care was the proximate cause of the injury; that plaintiff did not attempt to board the car while it was still in motion, and before it had come to a stop; that the plaintiff was not guilty of negligence proximately contributing to his injury; and that his damages were $3,500. Upon respective motions for judgment and for a new trial, judgment was ordered for the plaintiff on the condition of his remitting the damages down to $2,000, from which judgment the defendant appeals.

For the appellant there was a brief by *Spooner & Rosecrantz,* and oral argument by *C. M. Rosecrantz.*

Ernest A. Kehr, for the respondent.

DODGE, J. Substantially the only issue in this case other than that of damages was whether the plaintiff attempted to board the defendant's street car while the same was in motion, or whether the attempt was made while the car was stationary, and that car being, of course, under the control of the defendant's servants, was negligently started, thereby throwing him down, and causing his injuries. The evidence on this issue was conflicting, and sufficient to support the conclusion of the

jury that the plaintiff's theory of the event was the correct one. The appellant urges two errors as affecting that conclusion, and another as affecting both that issue and the allowance of damages.

1. Upon the question of liability, it is urged that certain errors were committed in charging the jury as to proximate cause. In submitting the fifth question,—whether the negligence of defendant's servants in starting the car was the proximate cause of the injury,—the court defined proximate cause as follows:

"When we speak of the proximate cause of an injury, we mean not only the direct or natural cause of the injury, but also such a cause as a person of ordinary intelligence and prudence might, in the light of the attending circumstances, have reasonably foreseen would produce such an injury. So that, to answer this question in the affirmative, you will have to find two things: First, that the want of ordinary care on the part of the servant or servants of the defendant was the direct and producing cause of the injury, without the existence of which such injury would not have occurred; and, second, that the injury resulting therefrom was such as a person of ordinary intelligence and prudence would, in the light of the surrounding circumstances, have reasonably foreseen as the probable result of such want of care."

It cannot be doubted that this instruction is incorrect in several respects. Primarily, it is said that the negligence, in order to be the proximate cause of the injury, must have been the "direct and natural" and the "direct and producing cause, without the existence of which such injury would not have occurred." It is somewhat surprising that, after all that has been said by this court in recent years upon this subject, correct definitions of this somewhat metaphysical conception of proximate causation in cases of negligence should be evaded by trial courts. It is not essential that the negligence should be the direct cause of the injury. It suffices that it is the natural and probable cause. It is the natural cause when either it acts directly in producing the injury, or sets in mo-

tion other causes so producing it and forming a continuous chain in natural sequence down to the injury; thus linking the negligence with the injury by a chain of natural and consequential causation, although the former may be neither the immediate nor the direct cause of the event. But such causation cannot be proximate cause in law to arouse liability, unless an ordinarily prudent and intelligent person ought, in the exercise of such intelligence, to have foreseen that an injury might probably result from the negligence under like circumstances. *Deisenrieter v. Kraus-M. M. Co.* 97 Wis. 279, 72 N. W. 735; *Dehsoy v. Mil. E. R. & L. Co.* 110 Wis. 412, 85 N. W. 973; *Seaver v. Union,* 113 Wis. 322, 89 N. W. 163.

Again, complaint is made that the jury were told that, in order to answer the question in the affirmative, they must be able to find that a person of ordinary intelligence and prudence *would* have foreseen that the negligence would produce such an injury. The word "would" is complained of as carrying the idea of necessary foresight by an ordinarily prudent person, while the true idea is better embodied by "ought," "should," or "might naturally" foresee the likelihood of injury from the negligent act. This criticism is perhaps hypercritical, yet if the word "would" naturally conveys the idea of either necessity of foresight or necessity of result, it is more extreme than is authorized by the authorities. The other expressions above suggested are more certainly accurate, and ought to be used.

The further complaint is made that the charge declares the necessity that the ordinarily intelligent and prudent man ought to have foreseen not alone some injury, but such injury as in fact resulted. While the expression "the injury" and "such injury" appear in many places in our Reports as correctly expressing the idea of proximate causation, this court has recently carefully pointed out that the rule so stated is too stringent; that it suffices to charge a person with liability for a

negligent act if some injury to another ought reasonably to have been foreseen as the probable result thereof by the ordinarily intelligent and prudent person under the same circumstances, even though the specific injury might not be so foreseeable. *Mauch v. Hartford,* 112 Wis. 40, 60, 87 N. W. 816. It is apparent, however, that all of these imperfections or errors in the instruction are favorable to the appellant. They require the jury, in order to ascribe the injury to its negligence, to go further than the law requires; hence they could not have been prejudicial to the appellant in bringing about the affirmative answer to the fifth question. It is complained, however, by the appellant, that they became so prejudicial when applied to the seventh question, which inquired whether, if it was found the plaintiff attempted to board the car while in motion, and before it had come to a stop, he was guilty of negligence proximately contributing to the injury.[1] In the instruction with reference to this question the court merely referred the jury to the definitions already given of proximate cause. If there was error in this respect, however, we cannot consider it, for the appellant reserved no exception. Another reason, also, why such error could not work reversal is that the seventh question and its answer has no place in the verdict, in view of the negation by the jury, in answering the sixth question, of the defendant's theory that the plaintiff did attempt to board the car while in motion. No other negligence is suggested by any of the evidence in the case, nor was there any request for finding by the jury upon any other phase of negligence attributable to plaintiff.

[1] The submission of the seventh question objected to was as follows, the portion objected to being inclosed in parentheses: "Seventh. If you answer the sixth question, 'Yes,' was the plaintiff guilty of negligence proximately contributing to his injury? (That question you will consider in the light of the instructions which I have given you as to what is meant by ordinary care) and as to what is meant by proximate cause."—REP.

It is complained further that, while the instruction of the court with reference to the fourth question, which inquired as to a "want of ordinary care" on the part of defendant's servants, was correct, that the reference of the jury thereto in answering the seventh question, which inquired with reference to "negligence," was not a sufficient performance of the duty of the court to define the meaning of the latter word. For the reason already stated, namely, that the seventh question and its answer have no place in the verdict, this error, if it were one, is immaterial, and not prejudicial to the appellant. Apart from this consideration, however, we find that the court, in the instruction assailed, used the expressions, "want of ordinary care" and "negligence" as equivalents, and that in all reasonable probability the jury must have so understood them. If, however, the appellant had doubt on that question, he should have requested the court to further define the word "negligence," used in the seventh interrogatory. This he failed to do.

Complaint is further made that the court informed the jury that certain instructions given were requested by the defendant. We cannot consider this reversible error, although we reiterate our disapproval of the practice expressed in *Gutzman v. Clancy,* 114 Wis. 589, 598, 90 N. W. 1081. We are unable to agree with counsel that any of the instructions indicated to the jury the legal effect of their answers to the questions further than as any reasonably intelligent man must necessarily infer from the questions themselves. The instructions merely indicated the effect upon their answer to the question of their solution of certain details of fact, which is the proper function of the charge when special verdict is taken.

2. Appellant assigns as error the refusal to give to the jury, at its request, the following instruction: "You may consider, in determining upon the credibility of the plaintiff's statements, the motive he had to testify in his own

favor, and you should especially remember how far he is contradicted by disinterested witnesses upon the most material matters." The instruction was given, except that portion commencing, "And you should especially remember," etc. It is always dangerous for courts to enter into the detail of the facts and the evidence, and to instruct with reference to the effect thereof upon the testimony of individual witnesses. The court certainly went as far as it was safe in cautioning the jury against giving credibility to the plaintiff in contradistinction to other witnesses in the case.

3. A general assault is made upon the verdict, based upon the contention that it evinces passion and prejudice to such a degree that we should order it set aside. That question has been fully submitted to the trial court, and there resolved against the appellant. In that respect the court was acting in the field of judicial discretion, and we are unable to say that he failed to exercise it judicially. In connection with this argument, appellant complains of certain remarks of respondent's counsel. Certain of those remarks, which consisted substantially in a statement to the jury of his own experience and observation with reference to the frequency and peril from prematurely starting cars, doubtless were improper, as being statements of facts as upon the counsel's own knowledge, instead of comment upon the evidence in the case (see *Gutzman v. Clancy,* 114 Wis. 596, 90 N. W. 1081); but nowhere in the record does it appear that the remarks were objected to, or any opportunity given the counsel to withdraw the same, or the court to rule thereon, nor was any exception reserved thereon. Under such circumstances we cannot recognize the right of appellant to complain of them on appeal. Other remarks bearing upon the question of damages were objected to, but were promptly withdrawn by the counsel, and the jury were instructed to disregard the same. We think that this furnished sufficient justification for the court below to hold them innocuous, or

to hold that any injurious effect they might have had was cured by the remission of $1,500 from the $3,500 verdict, *Kiekhoefer v. Hidershide,* 113 Wis. 280, 291, 89 N. W. 189.

We are unable to say that the verdict is excessive. The plaintiff, who was a skilled mechanic forty-five years of age, suffered an injury from which he was confined some seven weeks and had been unable to fully perform the labors of his trade thenceforward; and there was evidence of his medical attendant, undisputed, that he conceived complete recovery of the use of the arm hardly possible. The case of *Patten v. C. & N. W. R. Co.* 32 Wis. 524, is suggested as offering some analogy. In that case this court limited the recovery to $1,200 for a dislocated shoulder. There the plaintiff was a woman, seventy-two years of age, with no evidence of any trade which would be interrupted by the injury to her shoulder, and there was no proof of any reasonably certain permanence of injury. Certainly the distinctions between the situation there and in this case are sufficient to warrant the difference between $1,200 and $2,000.

We find no error which could have worked prejudice to the appellant.

By the Court—Judgment affirmed.

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116 344
117 453

PIETSCH and others, Respondents, vs. KRAUSE, imp., Appellant.

December 19, 1902—January 13, 1903.

Corporations: Corporate stock: Fraud: Promoters: Purchase of stock below par: Statutes: Pleading: Joinder of causes of action.

1. Sec. 1751, Stats. 1898, provides that the capital stock of a corporation, divided into shares, shall be deemed personalty, and, when certificates thereof are issued, such shares may be transferred by indorsement of the owner and delivery of the certificate. Sec. 1753, and sec. 1, ch. 193, Laws of 1899, provides

that "no corporation shall issue any stock or certificate of stock" except in consideration of money, or labor, or property estimated at its true money value, actually received by it, equal to the par value thereof, and that "all stocks . . . issued" contrary to that section shall be void. Sec. 1773 contemplates that a corporation may transact business with its own members before it is at liberty to do so with others, and sec. 4436 provides for the punishment of the issuance of a false certificate of stock. *Held*, that the words "issue any stock," and "all stocks issued," in sec. 1753, refer to certificates of stock, as distinguished from the stock itself. *Clarke v. Lincoln L. Co.* 59 Wis. 655, 18 N. W. 492, criticised, and *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21, in so far as it may be regarded as holding that a person who has subscribed for stock, but not paid in the full amount required by sec. 1753, can have no protection in equity against promoters who have defrauded the corporation, overruled.

2. Plaintiffs brought action against the promoters of a corporation to recover, in behalf of the corporation, the amount of the moneys which the promoters severally subscribed and pretended to pay in. The shares of stock in the corporation were of the face or par value of $100; and it was alleged in the complaint, among other things, that plaintiffs had only paid for their stock at the rate of $34 per share. *Held*, that, notwithstanding such allegations, the complaint stated a good cause of action in equity in favor of the plaintiffs for the benefit of the corporation.

3. In an action by subscribers to corporate stock against the corporation and its promoters, the complaint stated three good causes of action and thereon the plaintiff prayed judgment: First, that the corporation have judgment for moneys subscribed but not actually paid in by the promoters for their stock; second, that plaintiffs recover of the defendants damages sustained by false and fraudulent representations as to the corporation's assets, whereby plaintiffs were induced to purchase stock; and third, that the board of directors and defendants be enjoined from selling plaintiffs' stock to pay assessments thereon and that defendants be enjoined from selling their own stock. *Held*, that the complaint stated a cause of action at law for damages and another in equity to prevent enforcement of liability of plaintiffs which were improperly united.

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

This is an appeal from an order overruling a demurrer to the amended complaint brought by the members and subscribers to the capital stock of the defendant corporation for the benefit of the corporation and all its stockholders similarly situated who choose to come in and be made parties, against the defendants, who were promoters of the corporation. The original complaint was held to be insufficient as against the defendant *Krause,* and so the order overruling the demurrer to the complaint was reversed by this court. 112 Wis. 418, 433, 88 N. W. 223. Thereupon the complaint was amended so as to obviate such defect, but otherwise the complaint seems to be substantially the same. It is so fully given in the former report of the case as not to require repetition here. It alleges, in effect, that the company was incorporated and organized in September, 1892, to deal in real estate, with a capital stock of $203,400, divided into 2,034 shares of the par value of $100 each; that the defendants, including the appellant, *Max C. Krause,* were promoters of the corporation; that in July, 1892, through one of their number, they obtained an option on each of two pieces of land in the aggregate containing 193½ acres, for the aggregate sum of $62,584; that subsequently they obtained two deeds of such lands to one of their number, in each of which the consideration price inserted was "$1.00 and other good and valuable consideration;" that at the time of receiving such deeds the person receiving the same gave back mortgages in the aggregate amount of $46,238; that thereupon the defendants, through the person receiving such deeds and giving back such mortgages, conveyed said lands, and the whole thereof, to the corporation for the consideration of $116,100, as therein expressed, and stating therein that such lands were free and clear from all incumbrances except certain mortgages, amounting in the aggregate to $46,238, "which the party of the second part [being the defendant corporation] hereby assumes and agrees to pay," and thereupon the defendants in

control of the corporation caused the corporation to issue to them, respectively, the number of shares of stock mentioned in the amended complaint, in the aggregate 1,472 shares, upon which none of the defendants paid anything, but upon each share of such stock there was credited $34 as having been paid, making in the aggregate $50,080, without any payment whatever being made therefor; that the balance of 562 shares of stock was designated by the defendants as "treasury stock," which was to be sold for cash, and the amount received therefor was to be used in making the first payment of the purchase price of the lands, and to return and pay back to the defendants, as such promoters, all the money which had been advanced by them on the purchase of the lands, and for each share which the defendants, respectively, sold of the 562 shares, he was to have a commission of $2; that the defendants severally succeeded in selling 525 shares of such "treasury stock," making their aggregate commissions $1,050; that of the 525 shares of stock so sold the plaintiffs herein were at the time of the commencement of this action the owners and holders of 370½ shares, and that of such "treasury stock" there are still thirty-seven shares unsold. The complaint is interspersed with numerous allegations to the effect that the defendants, as such promoters, entered into a scheme to syndicate said lands; that the contracts therefor were so entered into for the purpose of concealing and covering up the fraud of the purchasing the lands for the sole benefit of the corporation, in order that the defendants might reserve to themselves a large secret profit; that in furtherance of such scheme, secret agreements were made among themselves, as stated; that the defendants, to deceive others, pretended to make *bona fide* subscriptions for stock, but with no intention of ever paying therefor, and they never did; that the plaintiffs were kept wholly ignorant of such scheme, and were misled by such false subscriptions; that the first board of directors was composed almost entirely of such promoters and participants

in such fraudulent scheme to mislead, cover up, and conceal the true facts as to such purchase price; that the defendants made false and fraudulent representations with intent to deceive as to the original price of said lands, which the plaintiffs believed and relied upon in subscribing for such stock, and that the defendants had wrongfully and fraudulently diverted the funds and property of the corporation; that the plaintiffs had refused to pay the assessment of February 27, 1899, by reason of having discovered the frauds mentioned. The complaint closed by demanding judgment (1) in behalf of the corporation against the defendants for $55,000, with interest from October 7, 1893; (2) that the plaintiffs have and recover of the defendants any damages and losses sustained by them by reason of the fraud and deception aforesaid, to be fixed and determined by the court; (3) that the defendants be restrained and enjoined from advertising or disposing of any stock held by them, or either of them, in the corporation, or any stock owned by them, or either of them, but held by others secretly for the benefit of said defendants, or either of them; (4) that such board of directors and the defendants be restrained and enjoined from selling, advertising, or offering for sale the stock of the plaintiffs, or any part thereof, or any interests of the plaintiffs in said corporation, to pay said assessment, as hereinbefore set forth, until the further order of the court; and for general relief.

The cause was submitted for the appellant on the brief of *Quarles, Spence & Quarles,* and for the respondents on that of *Geo. L. Williams.*

CASSODAY, C. J. The first ground of demurrer is that the amended complaint fails to state a cause of action in equity in favor of the plaintiffs for the benefit of the corporation. This is put upon the ground "that none of the plaintiffs are holders of any valid stock in the corporation"; that "every certificate of stock held by every plaintiff is, under our stat-

ute, absolutely void." The reason for this claim is that the respective plaintiffs only paid for their stock at the rate of $34 per share. In support of such contention counsel rely upon the statute, which declares:

"No corporation shall *issue* any stock or certificate of stock except in consideration of money, or labor or property estimated at its true money value, actually received by it, equal to the par value thereof, . . . and all stocks . . . issued contrary to the provisions of this section . . . shall be void." Sec. 1753, Stats. 1898, and sec. 1, ch. 193, Laws of 1899.

Whether such claim of counsel can be maintained depends upon what is meant by the words "no corporation shall *issue* any stock or certificate of stock," and that "all stock issued contrary" to that section "shall be void." There can be no mistake as to the meaning of the words "certificate of stock." Another section of the statute provides:

"The capital stock of every corporation, divided into shares, shall be deemed personal property, and when certificates thereof are issued, such shares may be transferred by indorsement of the owner . . . and delivery of the certificate." Sec. 1751.

The section then provides for the delivery and transfer of such stock certificate. See *Morey v. Fish Bros. W. Co.* 108 Wis. 527, 528, 84 N. W. 862. Another section of the statute provides for the punishment of the issuance of a false certificate of stock. Sec. 4436. As recently stated by Mr. Justice DODGE, the object of sec. 1753 is to protect those dealing with corporations, "rather than those dealing in stock certificates." *First Avenue L. Co. v. Parker,* 111 Wis. 7, 86 N. W. 606. It is stated by a standard author:

"A certificate of stock is, from one point of view, a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of the stock; that is to say, it is a written acknowledgment by the corporation of the interest of the shareholder in the corporate property and fran-

chises. It operates to transfer nothing from the corporation to the shareholder, but merely affords to the latter evidence of his rights. It should be clearly apprehended that the certificate is not the stock, but merely written evidence of the ownership of shares. . . . The certificate, therefore, has value in itself only as evidence, and, apart from the shares which it represents, it is utterly worthless." 1 Cook, Stock & Stockh. & Corp. Law, § 14.

The question recurs whether the words of sec. 1753 prohibiting the *"issue"* of "any stock," and declaring "all stocks . . . issued contrary" to that section to "be void," mean anything different than a mere certificate of stock. In the section of Cook cited it is said that "it is not essential to the existence of the corporation that certificates of stock shall be issued," and he speaks of the issue of stock as the issue of a certificate of stock.

"The capital stock of a corporation is the money or property put into the corporate funds by the subscribers for their stock, which fund becomes the property of the corporation. A share of said capital stock is the right to partake, according to the amount put into the fund, of the surplus profits, and, upon dissolution of the corporation, of the fund remaining after payment of debts." *Burrall v. Bushwick R. Co.* 75 N. Y. 211.

"The interest of a stockholder in the corporate property represented by his stock is nothing more than a *pro rata* share in the property of the company remaining after the payment of debts and expenses, with the intermediate right to share in the profits." *Van Brocklen v. Smeallie,* 140 N. Y. 78, 35 N. E. 415; *People ex rel. Wiebusch & H. Co. v. Roberts,* 154 N. Y. 101, 47 N. E. 980; *Flynn v. Brooklyn C. R. Co.* 158 N. Y. 504, 53 N. E. 520.

It is said in a Massachusetts case:

"The certificate, though convenient as evidence of title, does not itself constitute the title. The certificate is not the stock. . . . A share in a corporation is a right to participate in the profits, or in a final distribution of the corporate property, *pro rata.*" *Field v. Pierce,* 102 Mass. 261.

Our statute cited declares that the "capital stock," when "divided into shares, shall be deemed personal property," and then prescribes the functions of certificates. Sec. 1751. Another section of the statutes contemplates that a corporation may transact business with its own members before it is at liberty to transact business with others. Sec. 1773. We must hold that the words "issue any stock" and "all stock . . . issued," in sec. 1753, mean the same, in effect, as the words "certificate of stock."

The distinction between stock in a corporation and a certificate or evidence of a right to such stock was not observed in *Clarke v. Lincoln L. Co.* 59 Wis. 655, 18 N. W. 492, nor *Hinckley v. Pfister,* 83 Wis. 64, 53 N. W. 21. In the first of these cases the action was to recover back money paid upon a contract void as against public policy. The other case related to bonds actually issued contrary to the statute, and void, and it was held that the plaintiff had no standing in equity upon several grounds. In so far as that case may be regarded as holding that persons who have subscribed for stock in a corporation and paid in their money, although not the full amount required by sec. 1753 of the statutes, can have no protection in a court of equity against promoters who have defrauded the corporation, it must be regarded as overruled. Under the repeated rulings of this court, we must hold that the complaint states a good cause of action, in equity, in favor of the plaintiffs for the benefit of the corporation. *Pittsburg M. Co. v. Spooner,* 74 Wis. 307, 42 N. W. 259; *Fountain Spring P. Co. v. Roberts,* 92 Wis. 345, 66 N. W. 399; *Forest L. Co. v. Bjorkquist,* 110 Wis. 551, 86 N. W. 183, and cases there cited. The complaint prays judgment in behalf of the corporation for the amount of the moneys which the defendants severally subscribed and pretended to pay in, but never in fact did pay in.

2. Another ground of demurrer is that two or more causes of action are improperly united. It becomes important,

therefore, to determine whether there is another good cause of action alleged in the complaint which ought not to be joined with the one mentioned for the benefit of the corporation. The complaint also prays judgment "that the plaintiffs have and recover of the defendants any damages and losses sustained by them by reason of the fraud and deception aforesaid, to be fixed and determined by the court." There are numerous allegations in the complaint to the effect that the plaintiffs were deceived and defrauded by false representations knowingly made by the defendants as to the purchase price of the lands, and upon which the plaintiffs relied, and were thereby induced to subscribe for stock in the corporation, and pay therefor $34 per share. This cause of action is one at law for damages and losses sustained by the plaintiffs. The complaint also prays judgment "that said board of directors and the defendants be restrained and enjoined from selling, advertising, or offering for sale the stock of the plaintiffs, or any part thereof, or any interests of the plaintiffs in said corporation, to pay said assessment levied as hereinbefore set forth, until the further order of the court." This is a cause of action in equity to prevent the board of directors and the defendants from enforcing the collection of an assessment of the stock of the plaintiffs, and to enjoin the board and defendants from making such collection by the sale of the stock of the plaintiffs. The complaint also prays judgment that the defendants be restrained from selling their own stock, or any part thereof. This may, perhaps, be regarded as ancillary to the first cause of action. Whether it is or not is unnecessary to here determine. There are at least three good causes of action improperly united.

By the Court.—The order of the superior court of Milwaukee county is reversed, and the cause is remanded, with direction to sustain the demurrer, and for further proceedings according to law.

HOLZ, Respondent, vs. REDISKE and others, Appellants.

December 19, 1902—January 13, 1903.

Justices of the peace: Second adjournment: Jurisdiction: Docket entries: Presumptions: Subpœna: Attachment of witnesses: False imprisonment: Officers: Direction of verdict: Practice: Appeal and error: Judgments: Evidence: Material error: Damages.

1. Sec. 3631, Stats. 1898, provides that in justices' courts an adjournment, after the first, can only be granted on consent of the parties, or upon affidavit showing the absence of a material witness. From the docket entries of a justice of the peace it appeared that three adjournments had been had, when, on plaintiff's request, "for the reason that his lawyer could not be present," a fourth adjournment was taken. *Held*, that the justice lost jurisdiction when he granted the fourth adjournment.
2. Where the docket entries of a justice of the peace show the cause on which a second adjournment was granted, no presumption can be entertained that proper cause therefor was shown, or that consent thereto was given, and, if the cause appearing on the docket is insufficient, the justice loses jurisdiction on granting such adjournment.
3. Where a justice of the peace has lost jurisdiction, he has no power to issue a subpœna to compel the attendance of a witness, nor to issue an attachment for his appearance in that case.
4. In such case, the attachment being void, arrest and detention thereunder constitute false imprisonment as a matter of law.
5. In an action for false imprisonment it appeared, among other things, that H. was the defendant in an action brought by R. before W., a justice of the peace; that after three adjournments R., without the affidavit required by sec. 3631, Stats. 1898, procured a fourth adjournment because his lawyer could not be present; that on the adjourned day H. did not appear, and a subpœna was issued to compel his appearance; that H., having refused to obey the subpœna, an attachment, regular on its face, was issued by W. and delivered to S., a constable, who arrested H. and brought him before the justice, where he was detained for some time. H. brought an action for false imprisonment against R., the justice, and the constable. *Held*, that a verdict should have been directed against R. and W.,

and that the only question to be submitted to the jury, so far as they were concerned, was the question as to the amount of damages.

6. In such case, there being no evidence tending to show that S., the constable, had any knowledge of any lack of jurisdiction of the justice, S. was protected by his writ, and judgment in his favor should have been directed.
7. In an action against a constable and two others for false imprisonment, judgment was rendered against them all, jointly. The judgment was erroneous as to the constable because he acted under a writ, fair on its face, and without knowledge of any jurisdictional defects. *Held*, that the error necessitated reversal of the whole judgment.
8. In an action for false imprisonment it is error to permit plaintiff, against objection, to state that he had a family, and to give the number of his children.
9. In an action for false imprisonment in the arrest and detention of plaintiff by attachment for contempt in refusing to obey a void subpœna, evidence that plaintiff was found guilty of using abusive language to the officer who made the arrest, and was imprisoned therefor, is inadmissible.
10. In an action for false imprisonment it is competent, on the question of damages, to show the manner of the arrest, and all that was said and done while the plaintiff was held under the warrant under which he was arrested.

APPEAL from a judgment of the superior court of Milwaukee county: LAWRENCE W. HALSEY, Judge. *Reversed.*

This is an action for false imprisonment, in which the plaintiff, after a jury trial, recovered a judgment against the defendants for $500 and costs. It appeared upon the trial that the action grew out of a previous civil action in which the defendant *Rediske* had sued the plaintiff, *Holz*, before the defendant *Wolski*, a justice of the peace, for the unlawful sale of mortgaged chattels. That action was brought in September, 1900, and the case was continued from time to time until October 26, 1900, when *Rediske* asked for a further continuance. The continuance was granted by the justice, and this entry made in his docket:

"Plaintiff asked for an adjournment for the reason that his lawyer could not be present. Motion granted. Case is

adjourned until the 2d day of November, A. D. 1900, at 2 p. m., at this office."

On the 2d of November *Holz* did not appear, claiming that the justice had lost jurisdiction, and a subpœna was issued for him, commanding his appearance. He refused to obey the subpœna, and, upon the fact appearing by affidavit, the justice, *Wolski,* issued an attachment against him for contempt, upon which the defendant *Strothenke* arrested him, and brought him before the justice, where he was detained some time. It further appears that upon the return of the constable with *Holz* the defendant *Wolski* entered in his docket that the "defendant *Fred Holz* now appears in person, and asks that this cause be continued until the 8th day of November, 1900, at 2 o'clock in the afternoon of that day. Motion granted, and by consent of parties this action is adjourned," etc. It also appears that while *Holz* was still at the justice's office a complaint was made against him for using abusive language towards *Strothenke,* and he was tried before *Wolski,* and sentenced to imprisonment in the house of correction for fifteen days, and that he worked out the sentence. The testimony as to his imprisonment in the house of correction was, however, afterwards stricken out by the court, except so far as it was offered for the purpose of impeachment of *Holz's* credibility as a witness. The verdict of the jury was general against all of the defendants.

For the appellants the cause was submitted on the brief of *Doerfler, McElroy & Eschweiler.*

For the respondent there was a brief by *J. E. Wildish* and *Irving T. Ford,* and oral argument by *Mr. Wildish.*

WINSLOW, J. The docket of the justice of the peace conclusively shows that he lost jurisdiction of the action of Rediske against Holz when he adjourned that action until the 2d day of November on plaintiff's request "for the reason that his [plaintiff's] lawyer could not be present." This

was the fourth adjournment of the cause, and it could only be granted by consent of the parties, or upon affidavit showing the absence of a material witness, as prescribed in sec. 3631, Stats. 1898. It is true that it is not essential that the docket should show the cause of the adjournment, for, in the absence of any statement in the docket as to the cause, it will be presumed that proper cause was shown or consent given. *State ex rel. Dearborn v. Merrick,* 101 Wis. 162, 77 N. W. 719. But where the cause is given in the docket no such presumption can be entertained, and, if the cause be insufficient, jurisdiction will be lost. This was the case in *Gallager v. Serfling,* 92 Wis. 544, 66 N. W. 692, where the docket showed that the cause was adjourned "in consequence of the sickness of the court." The record in that case shows that this was the expression used in the docket, and that it did not appear affirmatively by any statement in the docket that no other cause was shown, as might be supposed, perhaps, from the opinion. Thus the case became almost the exact duplicate of the case at bar, and is therefore controlling.

The justice having lost jurisdiction of the case, he had no power to issue a subpœna to compel the attendance of *Holz* as a witness, nor did he have any power to issue an attachment for his appearance. The attachment was void, and the arrest and detention under it constituted false imprisonment as a matter of law. Hence a verdict should have been directed against *Wolski,* the justice, and *Rediske,* the plaintiff in that action; and the only question to be submitted to the jury, so far as they were concerned, was the question as to the amount of damages. As to the constable, *Strothenke,* the case was different. He acted under a warrant of arrest regular on its face, and is not shown to have had any knowledge of any lack of jurisdiction of the justice. Under such circumstances the officer is protected by his writ. *Sprague v. Birchard,* 1 Wis. 457; *Lueck v. Heisler,* 87 Wis. 644, 58 N. W. 1101. Hence a verdict for the defendant *Strothenke*

should have been directed. This will necessitate reversal of the entire judgment, as the recovery was joint. *Young v. Wise,* 7 Wis. 128.

There are, however, other errors claimed, and two will be noted. The plaintiff was allowed to state against objection that he had a family, and to give the number of his children. Under the rule recently laid down in *Bergeron v. Peyton,* 106 Wis. 377, 82 N. W. 291, this was erroneous.

The complaint shows that the action was brought specifically for the illegal arrest and the subsequent false imprisonment in the office of the justice of the peace, and not for the imprisonment in the house of correction under the conviction for using abusive language. Evidence of the imprisonment in the house of correction was allowed, however, generally, against objection by the defendants. This was clearly inadmissible and should not have been admitted as proof generally in the case. It is true that the court struck it out towards the close of the case, and, while we might not reverse for this cause alone, we deem it proper to note the error as a guide in a new trial.

The questions in the case were really very simple. The defendant *Strothenke* was entitled to be discharged. As to the defendants *Rediske* and *Wolski* the only question was as to the amount of damages. Upon this question it was competent to show the manner of the arrest, and all that was said and done at the office of the justice while the plaintiff was held under the warrant of attachment. There should be no difficulty upon a new trial.

By the Court.—Judgment reversed and action remanded for a new trial.

BROWN, Respondent, vs. WARNER and another, Appellants.

December 19, 1902—January 13, 1903.

Evidence: Account books: Admissibility: Statutes: Appeal and error: Material error: Limitation of actions: Instructions to jury.

1. Secs. 4186, 4187, Stats. 1898, make an account book, when verified in the manner there prescribed, presumptive proof of the charges therein contained, but provide that such books shall not be admitted as testimony of any item of money delivered at one time exceeding five dollars, or of money paid to third persons. In an action on contract plaintiff was allowed, against proper objections, to introduce in evidence, generally, as proof of his cause of action, an account book, not verified as the statute required in several material particulars, and containing charges for money paid at one time exceeding five dollars, and also charges of money paid to third persons. *Held*, that it was error to receive the book in evidence without any limitation whatever as to its evidentiary effect.
2. Such error is not immaterial because defendant admitted on the trial that the plaintiff was entitled to recover the full amount demanded in his complaint, if he was entitled to recover at all, where it appears that the book may have been considered by the jury on the issue respecting the nature of the contract, and have turned the scale in plaintiff's favor.
3. Where the question of whether plaintiff's claim was barred by the statute of limitations turned upon whether he was authorized by defendants to apply certain rents in his hands, belonging to them, in part payment of their indebtedness to him, it was proper to admit in evidence letters from a third party to defendants, requesting them to make certain payments to persons named, together with certain receipts to plaintiff therefor, plaintiff having testified that by authority of defendants he executed the requests contained in such letters, by collecting rents for defendants and making the payments therewith, taking therefor the receipts in his own name.
4. Remarks of the court in overruling objections to the introduction of such letters and receipts, that "whether plaintiff had authority to collect the rent or not is not very material when we come right down to it," criticised, and *held* to be language tending to confuse the jury.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action to recover on contract. Plaintiff's claim was that he performed services for defendants in selling, exchanging and trading real estate at the agreed price for such service of $1 for each acre handled, and his expenses, including railroad fare and hotel bills incurred in the business; that the amount handled was 360 acres; that the expenses incurred were $36; that defendants became indebted to him by reason thereof in the sum of $396, which became payable on or before May 5, 1894; and that the same remained unpaid when the action was brought, except $131. Judgment for the balance was demanded.

Defendants denied the contract declared on, but alleged that plaintiff and defendants jointly performed services in handling lands for one McMillan, for which the latter agreed to pay the three a portion of such land for their services, plaintiff to have one-third thereof; that plaintiff collected $131 rent from the joint property so received, and wrongfully converted the whole to his own use, though $65.67 thereof belonged to defendants. They counterclaimed for that amount. Defendants further alleged that plaintiff's cause of action, if he had one, accrued more than six years before the commencement of this action, and that the same had not been, during such time, acted upon by him or recognized by defendants.

The evidence was conflicting as to the agreement between plaintiff and defendants, but not as to the performance of services in handling lands to the amount claimed. It was conceded at the close of the evidence, that if he was entitled to recover at all he was entitled to the amount claimed. There was proof that $131 was collected by plaintiff from rents, and that all of said sum belonged to the defendants. The evidence was conflicting as to whether plaintiff was authorized to collect such rent and apply the same in payment of defend-

ants' indebtedness to him. The jury found specially in plaintiff's favor on all matters of fact. Judgment was rendered accordingly.

For the appellants there was a brief by *Wheeler & Perry,* and oral argument by *Lyman G. Wheeler.*

For the respondent the cause was submitted on the brief of *John H. Paul.*

MARSHALL, J. From the foregoing statement it will be seen that the primary vital question to be solved upon the trial of this case was, Did the parties to the litigation make the contract alleged in the complaint? Plaintiff was allowed to introduce in evidence, generally, to prove his cause of action, an account book in which transactions were entered in debit and credit form, as having occurred between him and defendants, in harmony with his testimony as to what the contract was. It is not claimed that the book was admissible as independent evidentiary matter other than under secs. 4186 and 4187, Stats. 1898. The first section makes an account book, when verified in the manner prescribed, presumptive proof of the charges therein contained, subject to this limitation contained in the second section:

"Such books . . . shall not be admitted as testimony of any item of money delivered at one time exceeding five dollars, or of money paid to third persons, or of charges for rent."

The book here was not verified as the statute required in several material particulars not necessary to enumerate. It contained charges of money paid at one time exceeding $5, and of money paid to third persons. Nevertheless it was received in evidence against proper objections, without any limitation whatever as to its evidentiary effect. That was error.

Respondent's counsel suggests that the ruling of the court above disapproved was not harmful to appellants in any event, because they admitted upon the trial that respondent was

entitled to recover the full amount claimed in the complaint if he was entitled to recover at all, leaving only to be determined two questions: First, was the contract between the parties as alleged by plaintiff? Second, was the cause of action upon the contract kept alive by payments made thereon within the six years immediately preceding the commencement of the action? Such suggestion would satisfactorily answer the assignment of error on this branch of the case were it not for the fact that the evidentiary effect of the book was not limited, either by the offer thereof or the ruling of the court admitting it. It is considered that the book may probably have been considered by the jury, under the circumstances, on the issue respecting the nature of the contract, and have turned the scale in plaintiff's favor. On that, it was clearly incompetent evidence. It was in the nature of a mere declaration by plaintiff in his own favor, not within any exception to the general rule excluding such declarations. Therefore, we cannot avoid the conclusion that the ruling of the court constitutes reversible error.

The court permitted two letters, written by B. F. McMillan and brother to *E. E. Warner,* one of the appellants, to be admitted in evidence against objection by respondent's counsel. One contained a request to *Mr. Warner* to pay a person named $31.50, and the other contained a like request as to another person for the payment of $17.50. Together with the letters there were admitted, under objection, two receipts. The letters and receipts, with the evidence of plaintiff, were to the effect that the latter, by authority of appellants, executed the request contained in such letters by collecting rents for the former and making the payments therewith, taking therefor the receipts in his own name. In the course of remarks overruling the objection to the introduction of the letters and receipts, the court used this language:

"It [referring to such evidence] is simply allowed for the purpose of showing just what the relations of the parties were,

and as to either supporting or contradicting evidence that came in. It is not very material. . . . It has a bearing upon the relations of the parties. . . . It simply goes to the question of whether he had authority to collect the rent, which is really immaterial in the case when we come right down to it."

Complaint is made, both of the ruling admitting the letters and receipts, and of the remarks. The papers, in connection with plaintiff's evidence, did have a bearing on the question of whether he had authority to collect rent for defendants. That seems plain. They were entitled to be received on that theory. The remarks of the court were only to the effect that they were received for that purpose. Since the question of whether plaintiff's claim was barred by the statute of limitations turned on whether he was authorized by defendants to apply rent in his hands belonging to them in part payment of their indebtedness to him, it was certainly proper, not only to show that the money rightfully came to his possession, but that he possessed the requisite authority to apply it to his own use as he did. It is not entirely clear what the court meant in saying that "whether plaintiff had authority to collect the rent or not is not very material when we come right down to it." That remark better have been omitted. If the idea the judge had in mind was that the turning point was not whether plaintiff had authority to collect the rent, but whether he had authority to apply the same upon the alleged indebtedness of defendants to him, he was right, though we must confess the language used tended to confuse. We repeat, the remarks better have been omitted, though we are not prepared to hold that the making thereof is prejudicial error.

For the error in admitting the book in evidence without its being properly verified and the evidentiary effect thereof properly limited, the judgment must be reversed and the cause remanded for a new trial.

By the Court.—So ordered.

APPLETON WATERWORKS COMPANY, Respondent, vs. CITY OF APPLETON, Appellant.

December 19, 1902—January 13, 1903.

Municipal corporations: Waterworks bonds: Issuance: "Non-liability" bonds: Municipal bonds: Vote of electors: Statutes: Applicability: Construction: Repeal: Cities under special charters: Class legislation: Constitutional law.

1. Sec. 16, subch. V, ch. 441, Laws of 1885 (an act to consolidate and amend the charter of the city of Appleton),—a city containing a population of 15,085, and hence of the third class,—provides that "the common council shall not have power to issue any bonds or other evidences of debt . . . except in cases authorized by this act, or some law of this state." Secs. 942, 943, R. S. 1878, in force at the time, authorized cities to issue bonds for waterworks, but provided that no bonds should be issued therefor until the proposition had been submitted to the electors of the city and adopted by a majority voting thereon. Said secs. 942, 943 were re-enacted in the Wisconsin Statutes of 1898, with additional provisions, that "unless otherwise provided by law" no city should issue bonds, except in certain instances, "unless upon compliance with the following conditions," followed by specific directions as to the manner in which elections should be held. Ch. 311, Laws of 1893 (sec. 926—11, Stats. 1898), authorizes cities incorporated by and acting under a special charter to issue regular municipal bonds for waterworks. Ch. 348, Laws of 1899, entitled "An act to authorize cities of the third and fourth classes to acquire waterworks and issue bonds therefor," by secs. 1–3 thereof, authorizes cities of the third and fourth classes to construct waterworks; requires, before proceeding with the construction, that the question of the building thereof shall be submitted to a vote of the electors of the city, and directs, if a majority of the ballots cast favor the proposition, that the common council may issue bonds for the unpaid cost of the works, which shall recite on their face that they are secured by trust deed or mortgage on the waterworks and that no municipal liability is created thereby. *Held*, that said ch. 348, Laws of 1899, is simply an enabling act, intended to provide a way by which cities of the third and fourth classes may purchase or build waterworks by the issuance of "non-liability" bonds, and not an act imposing further conditions upon cities

which propose to issue "municipal" bonds, or as an act repealing existing legislation.

2. Said ch. 348, Laws of 1899, so far as it purports to authorize such cities to build and operate waterworks, is declaratory of existing power, and must be construed as constituting one scheme and carrying but one definite purpose, and hence is not applicable to a case where a city, under definite authority, given elsewhere in the law, is about to build waterworks, and pay for them in cash or in "municipal" bonds, strictly so called.

3. Ch. 326, Laws of 1889 (the general charter law), governs cities organized under its provisions, and all cities organized under special charters which shall in the manner therein specified adopt its provisions. Sec. 133 thereof authorizes the common council of all cities acting under the general charter law to issue bonds for the purpose, among others, of constructing waterworks, but provides that no bonds shall be issued therefor unless authorized by a three-fourths vote of the councilmen-elect. Ch. 312, Laws of 1893, amends said sec. 133 by adding another proviso, to the effect that in cities of less than 5,000 population the bond ordinance must be ratified by a vote of the people. This is now incorporated in sec. 925—133, Stats. 1898. At the same time ch. 311, Laws of 1893, was enacted, providing that cities, acting under special charters, having a population of 3,000 or more, should have power, among others, to issue bonds for waterworks by a three-fourths vote of the common council. This now appear as sec. 926—11, Stats. 1898, the population limitation having been stricken out. Secs. 942, 943, R. S. 1878, authorizes cities to issue bonds for waterworks, but provide that no bonds shall issue until the proposition has been submitted to a vote of the people, and adopted by a majority of the electors voting thereon. Said secs. 942 and 943 were re-enacted, with additional provisions, in the Statutes of 1898. *Held:*

(1) That chs. 311 and 312, Laws of 1893, did not constitute a revision of the law on the subject, and thereby impliedly repeal so much of sec. 943, R. S. 1878, as imposed additional conditions on the exercise of the bonding power, but merely threw additional safeguards around the power to issue bonds.

(2) That a city operating under a special charter (ch. 441, Laws of 1885), and thereby prohibited from issuing bonds except in cases authorized by some law of the state, could not issue bonds for waterworks without first submitting the question to a vote of the inhabitants as provided by said sec. 943.

4. Inasmuch as sec. 925—133, Stats. 1898 (governing cities organized under the general charter law), and sec. 926—11, Stats. 1898 (governing cities organized under special charters), both authorize the issue of bonds for waterworks, and are equally subject to sec. 943, Stats. 1898 (requiring a vote of the inhabitants in favor of bonding before the issue of bonds for waterworks), if either is subject thereto, it is immaterial whether a city, acting under a special charter, has adopted the general charter law as to the provisions relating to waterworks, or whether, by virtue of ch. 165, Laws of 1899 (validating supposed but incomplete adoptions of the general charter law), such incomplete and insufficient action of a special-charter city has become operative.
5. Sec. 4987, Stats. 1898, provides that "none of the general provisions of these Revised Statutes shall be construed so as to affect or repeal the provisions of any special acts relating to particular cities unless such acts are enumerated in the acts hereby repealed." *Held*, that parts of the general charter law, adopted or attempted to be adopted by the city of Appleton and validated by ch. 165, Laws of 1899, did not become part of any special law relating to Appleton, but remained a general law, and were not changed in character by the fact that a city had chosen to adopt it.
6. Sec. 926—11, Stats. 1898, governing cities operating under special charters, is a general law, applicable to a valid legislative class of cities, namely, all cities operating under a special charter.
7. While, in cases of extreme doubt, the fact that great mischief may result from frequent and long continued violation of law by municipalities may be weighty, it does not justify courts in disregarding and overriding plain and imperative statute law.

APPEAL from an order of the circuit court for Winnebago county: GEO. W. BURNELL, Circuit Judge. *Affirmed.*

Geo. G. Greene, of counsel, for the appellant.

Lyman E. Barnes, attorney, and *George Lines,* of counsel, for the respondent.

WINSLOW, J. The plaintiff is a taxpayer in the defendant city, and brought this action in equity in February, 1902, to perpetually restrain the city from issuing or negotiating municipal bonds to the amount of $260,000, which were about

to be issued under an ordinance then recently passed by the common council of the city, for the purpose of constructing waterworks in said city. The grounds upon which the injunction is sought are that the provisions of sec. 943, Stats. 1898, and ch. 348, Laws of 1899, (as amended by ch. 143, Laws of 1901), have not been complied with. A preliminary injunctional order was granted, and a motion to dissolve the same was denied by the court, and from that order the defendant appeals.

It is admitted that neither the question of the construction of the works, nor the question of the issuance of the bonds, has ever been submitted to a vote of the people; and the simple question is whether the city of *Appleton* can legally issue municipal bonds without such vote, or either of them. The question was argued with ability upon both sides, and it is certainly a most important one to the municipalities of the state, and one not easy of satisfactory solution. To understand it fully, a brief review of the various statutes bearing upon the subject must first be had.

The city of *Appleton* is a city of the third class, containing a population of 15,085, and was incorporated under a special charter, which was finally consolidated and amended by ch. 441, Laws of 1885. This act contained no provision authorizing the issuance of municipal bonds for any purpose, but, on the contrary, contained the express provision that "the common council shall not have power to issue any bonds or other evidences of debt . . . except in cases authorized by this act or some law of this state." (Sec. 16, subch. V, ch. 441, Laws of 1885). As there was no provision in the charter authorizing the issuance of time bonds, it is plain that the city did not have power to issue the bonds in question under its special charter when the same was passed in 1885. At this time, however, there stood upon the statute books of the state secs. 942 and 943, R. S. 1878, which gave power generally to certain municipal and *quasi*-municipal corporations to issue

negotiable bonds for certain purposes and under certain conditions. Sec. 942 provided that "any county, town, village, or city" might issue negotiable bonds, "under the provisions of this chapter," for the purpose of paying for an authorized subscription to the stock or bonds of any railroad corporation, and for the following purposes:

"The purchase or erection of public buildings; the purchase of fire engines or any apparatus for the extinguishment of fires, the purchase or erection of pumps, water mains, reservoirs or any other waterworks; . . . the grading, macadamizing or paving of streets; the laying out, altering or widening thereof or of public grounds or parks; the purchase or improvement of cemeteries, the construction of school buildings, or in exchange for or compromise of any bonds previously issued and outstanding; provided, that the principal of such new bonds shall not exceed the principal of the old bonds; or to accomplish any other purpose in the lawful power of such corporation."

By the provisions of ch. 58, Laws of 1897, a slight change was made in this section, and by the revision or compilation of 1898 certain additional purposes were added to the list of purposes for which bonds might be issued, but, as neither of these amendments is material to the present question, it will not be necessary to further refer to them. Sec. 943, so far as material to this discussion, provided that:

"No bonds shall in any case be issued by any town, village or city until the proposition for their issue for the special purpose thereof shall have been submitted to the people of such municipality and adopted by a majority voting thereon."

By the revision of 1898 there was added to sec. 943 certain provisions prescribing the manner in which the election is to be held, which provisions begin as follows:

"Unless it is otherwise provided by law no town, city or village shall issue any bonds, except to aid in the construction of a railroad, unless upon compliance with the following conditions: whenever," etc. (Here follow specific directions as to

the manner of holding the election, which are not necessary to be stated.)

Had there been no more legislation on the subject, there can be no doubt of the proposition that the city of *Appleton* could only issue bonds for the purpose of building waterworks after an affirmative vote of the electors. The situation remained unaltered until the passage of the general city charter law (ch. 326, Laws of 1889), which was intended to govern all cities of the state thereafter created, and all cities previously created which chose to adopt its provisions in the manner prescribed by the act. Sec. 133 of this act, (as amended by ch. 312, Laws of 1893, and ch. 294, Laws of 1895), provided as follows:

"The council shall have authority to issue bonds for the following purposes only: (1) Building school houses and for public libraries. (2) Building bridges. (3) Erecting public buildings for the use of the city. (4) Purchase of apparatus for fire protection. (5) Street improvements which are to be paid for by the city. (6) Waterworks, sewer, and drains, lighting works for streets and public buildings, and in cities of other than the first class for the construction and operation of lighting works to supply the city and its inhabitants with electric or other light. (7) For the purchase or establishment of public parks, public drives, boulevards, cemeteries, garbage grounds, public hospitals and purchasing sites for public buildings. (8) Purchase of toll bridges and approaches. (9) Refunding municipal indebtedness. (10) Such other purposes as are authorized by these statutes. No such bonds shall be issued unless authorized by an ordinance adopted by a vote in favor of the same of at least three-fourths of all the members of the common council elect, said vote to be at a regular meeting not less than one week after the proposed ordinance shall have been published in the official paper of the city, and in cities with a population of less than five thousand unless such ordinance shall be ratified by a majority of the electors of said city who shall vote at a special election called for that purpose."

This section is now embodied in sec. 925—133, Stats. 1898. It contains further provisos as to the total amount of indebtedness allowed, the form of bonds, time of payment, and levy of taxes, which are not material here. It is to be noted also, that the proviso requiring the ratification of the ordinance by popular vote in cities of less than 5,000 population was engrafted into the section by ch. 312, Laws of 1893.

At the same time that ch. 312, Laws of 1893, was passed, amending sec. 133 aforesaid, another act was passed, known as "Chapter 311 of the Laws of 1893." Secs. 1 and 2 of this act are as follows:

"Sec. 1. The common council of any city incorporated by and operating under a special charter granted by the legislature of this state containing a population of three thousand inhabitants or more as shown by the last state or national census is hereby authorized to issue corporate bonds, payable in lawful money of the United States within twenty years from their issue, bearing interest payable annually or semi-annually at a rate not exceeding six per cent. per annum, for the following purposes: (1) For the erection and construction of a city hall and the purchase of a site for the same. (2) For the construction and extension of waterworks or the purchase of the same, and for constructing sewers, and for the improvement and maintenance of the same. (3) For the erection, construction and completion of school buildings and the purchase of school sites. (4) For the purchase of sites for engine houses, for fire engines and other equipments of the fire department and for the construction of engine houses. (5) For the purchase of sites for police stations and for the construction of buildings thereon for the use of the police department. (6) For the construction of viaducts, bridges and for repairs of the same. (7) For the erection and construction of library and museum buildings and the purchase of sites for the same. (8) For the establishment of public baths and hospitals and the purchase of sites for the same. (9) For the purchase of lands for public parks and improvements thereof, and for the payment of purchase money and interest thereon which may be or become due for

park lands already acquired or contracted for. (10) For permanently improving streets in such city, and for creating a fund out of which to advance the cost of repairs to sidewalks in anticipation of the collection of special assessments for such cost of repairs by the treasurer of such city. (11) For the construction or purchase of electric or gas light plants for lighting streets and public buildings. (12) For refunding existing indebtedness.

"Sec. 2. No bonds shall be issued under the provisions of this act, and no contract shall be entered into or obligation incurred by any such city in contemplation of the issue of such bonds in the future, unless such contract or obligation and the issue of such bonds for the payment of the same shall have been authorized by ordinance adopted by a vote in favor of the same of at least three-fourths of all the members of the council elect, said vote to be at a regular meeting of such common council, not less than one week after the proposed ordinance shall have been published in the official paper of such city; and provided, that no such bonds shall be issued, so that the amount thereof together with all the other indebtedness of such city, shall exceed five per cent. of the assessed valuation of such city at the last assessment for state and county taxes previous to the incurring of such indebtedness."

These sections were amended in some minor particulars by chs. 110, 135 and 173, Laws of 1897, and they now appear with such amendments as sec. 926—11, Stats. 1898, with the single exception that the clause limiting their operation to cities containing a population of 3,000 or more was stricken out in the revision of 1898, so that, in terms, they now purport to cover all cities of the state operating under special charters. No mention is made of this omission in the compiler's note to the section as it now stands in the Statutes of 1898.

In June, 1894, the common council of the city undertook, by ordinance, to adopt, as part of the charter of the city, sec. 925—133, *supra,* but it is admitted that the publication of the ordinance of adoption was insufficient. The city and its officers having assumed the act under sec. 925—133, however,

it is claimed by appellant's counsel that it has become effective by virtue of ch. 165, Laws of 1899, which provides that in case of the attempted adoption of the whole or a part of the general charter by any city, and of assumed action thereunder, any question of the validity of such supposed adoption must be tested by *certiorari,* or some other direct action brought for the purpose, within three months after the assumed adoption, and not thereafter, and, if not so tested and set aside, it shall not be questioned or held invalid in any subsequent action or proceeding. This contention is only material in one phase of the controversy, which will be hereafter referred to.

In 1899, and prior to any proceeding looking towards the issuance of the bonds in question, another act was passed by the legislature, known as "Chapter 348 of the Laws of 1899," entitled "An act to authorize cities and villages to acquire waterworks and issue bonds therefor." Sec. 1 of this act provides that cities of the third and fourth classes are authorized to purchase or build waterworks, to provide a supply of water for fire or domestic purposes or both. Sec. 2 provides that, before proceeding with the purchase or building of the works, the council shall, by resolution, submit the question of such building or purchase to the electors of the city at a municipal or special election, and specifies the form of the ballot, and the manner of holding the election. Sec. 3 provides that, if a majority of the ballots cast are in favor of the proposition, the common council may issue bonds for the unpaid portion of the purchase price or cost of the works, which shall recite on their face that they are secured by trust deed or mortgage upon the works, and that no municipal liability is created thereby, with certain other details not material here. Sec. 4 contains only detailed provisions as to form of the trust deed or mortgage, the creation of a sinking fund, and the payment of principal and interest, which are unnecessary to be considered. The bonds contemplated by the last-named act are called in the

briefs "nonliability bonds," and, for want of a better name, they will be so referred to in this opinion.

We have now stated the substance of the general laws bearing upon the subject which were upon the statute books at the time the bonds in question were proposed to be issued, and the action commenced, and are in a position to fully appreciate the questions involved.

The plaintiff's contention is that both ch. 348, Laws of 1899, and sec. 943, Stats. 1898, apply to the city of *Appleton,* and hence that it can issue no bonds for the construction or purchase of waterworks without having held both of the elections required by those acts. On the other hand, the city's contentions are (1) that ch. 348, Laws of 1899, is unconstitutional; (2) that, if it be constitutional, it does not apply to the city of *Appleton,* but only to cities proposing to issue "nonliability bonds"; (3) that sec. 943, *supra,* has been, in effect, repealed by the provisions of secs. 925—133 and 926—11, Stats. 1898, so far as the bonds authorized to be issued under said last-named sections are concerned.

The difficulties which are met in the attempt to reconcile the various acts, and extract from them a definite legislative purpose, are manifest from the mere reading of them. Mere difficulties in construction, however, do not justify courts in ignoring or setting aside direct legislative mandates. Courts are bound to reconcile and apply statutory provisions, if by any fair and reasonable construction they can be reconciled, and they are bound to uphold them unless their unconstitutionality be plain. These are cardinal principles, which all recognize.

Bearing these principles in mind, we will first take up the question as to the application of ch. 348, *supra,* to the situation in hand. The act itself purports to apply in its first section to all cities of the third and fourth classes, and hence apparently includes the city of *Appleton.* It provides that, be-

fore purchasing or building waterworks, the common council of such a city shall submit the question for decision to the electors of the city. The appellant attempts to avoid its effect in the present case by claiming that it is unconstitutional, and that, if constitutional, still it is simply an enabling act, intended to apply only to cities which propose to issue "non-liability bonds," and hence does not affect the powers of cities proposing to issue regular municipal bonds. The grounds upon which the unconstitutionality of the act is claimed are: First, that it is a local act, and that the subject is not expressed in its title,—the title of the act applying to all cities, while the body of the act applies only to cities of the third and fourth classes; second, that it is a law amending the charters of certain cities, which, under secs. 31, 32, art. IV, Const., can only be done by general law, and this law is a special law, because the attempted classification is invalid, not being founded on any real differences of situation or condition; third, that, under its provisions, while no general municipal indebtedness may be incurred by the city still a certain form of indebtedness is incurred, for the payment of which certain property of the city is mortgaged, and hence it violates sec. 3 of art. XI, Const., which requires cities which become indebted "*in any manner* or for any purpose" to provide for the levy of taxes to pay the same before or at the time of the contracting of the debt. The questions thus presented are interesting and important questions, and their proper solution would call for careful consideration and research, especially with regard to the third objection. We find it unnecessary, however, in view of the conclusion we have arrived at as to the purpose and application of the law, to decide these questions, and we deem it best to reserve them until they are presented in a case where their decision is essential.

After mature consideration of the scope and provisions of the law, we agree with appellant's counsel that it should be construed simply as an enabling act, intended to provide a

way by which cities of the third and fourth classes may purchase or build waterworks by the issuance of the so-called "nonliability bonds," and not as an act imposing a further condition upon cities which propose to issue real municipal bonds, or as an act repealing any existing legislation. This result is reached rather by consideration of the act taken as a whole, in view of the existing condition of the statutes and common law upon the subject of the powers of cities to build and operate waterworks, than by construction of any specific sentence or part of the act. As before stated, it includes, in terms, all cities of the third class; but, so far as it purports to authorize such cities to build or operate such plants, the act was, as defendant's counsel well says, "an idle declaration of existing power." *Ellinwood v. Reedsburg,* 91 Wis. 131, 64 N. W. 885; secs. 927—1, 926—11, 925—133, and 942, Stats. 1898. The legislature must be presumed to have in mind the existing condition of the law, and must also be presumed to intend their legislation to fulfill some useful purpose. The power to issue "nonliability bonds," however, was not conferred in terms by any statute, and for this purpose legislation was evidently thought to be necessary; and the entire law (except the first section, which, as before pointed out, was unnecessary) seems framed to subsist together and as a complete whole. Its provisions are so framed as to follow each other in an orderly and consecutive way from the time of the inception of the proceedings in the common council until the execution of the bonds and the delivery of the trust deed or mortgage. We cannot resist the conclusion that they must all be construed together as constituting one scheme, and carrying out one definite purpose, and hence as not applicable to the case where a city, under definite authority given elsewhere in the law, was about to build waterworks, and pay for them in cash or in real municipal bonds. This being our conclusion upon this question, any further consideration of ch. 348, *supra,* is unnecessary, and we proceed to the question of the application

of sec. 943, *supra,* to the case in hand, and here we meet more doubtful questions.

This section, in terms, forbids the issuance of bonds by "any town, village or city" until the question has been submitted to a vote of the people, and approved by a majority vote. This law existed at the time of the passage of the special charter of the city of *Appleton.* Nothing in that charter contravened its provisions or limited its effect. Hence there can be no doubt that when that charter was passed, in the year 1885, and for a number of years thereafter, it was in full force and effect in that city. Has this situation changed, and the city been relieved from the requirements of sec. 943? There has been no express repeal of that section. On the other hand, it still stands upon the statute books, with material additions, as sec. 943 of the revision of 1898; but the appellant's claim is that there has been a repeal by implication, resulting from the legislation of 1889 and 1893, and this question must now be considered. It is not claimed that, so far as the city of *Appleton* is concerned, there was any repeal by the passage of the general charter law of 1889, but that law is so intimately connected with the legislation of 1893 that it must be noticed in the discussion of the question presented.

Ch. 326, Laws of 1889, known as the "general charter law," was a general law providing for the government of all cities in the state which should thereafter organize under its conditions, and all cities then existing under special charters which should adopt the act in the manner therein provided. Hence it did not, at the time of its passage, affect in any manner the city of *Appleton.* It divided cities into four classes, according to population, and provided a complete charter for each class. With subsequent additions and amendments, it still stands as the general charter law of the state, and is incorporated in the Statutes of 1898. Sec. 133 of this law gives power to the common council of all cities acting under it to

issue bonds for a number of public purposes, including waterworks, with a proviso that no such bonds shall be issued unless authorized by a three-fourths vote of the councilmen-elect. Nothing is said in the act regarding a vote of the people upon the question. In the year 1893 the general charter law received a number of amendments by the provisions of ch. 312, of the laws of that year, and among these amendments were several directed to sec. 133, by which a number of public purposes were added to the list of purposes for which bonds could be issued, and a further proviso added to the effect that in cities of less than 5,000 population the bond ordinance must be ratified by vote of the people. At the same time (and apparently with the intention of putting cities acting under special charters on an equal footing in this respect with cities organized under the general charter), ch. 311 was passed which provided that cities under special charters, having a population of 3,000 or more, should have power to issue bonds, by three-fourths vote of the common council, for various public purposes, including waterworks and most of the purposes named in the general charter; this law now appearing with subsequent amendments as sec. 926—11, Stats. 1898, the population limitation having been stricken out.

The appellant's claim, in brief, is that this legislation of 1893, comprised in chs. 311 and 312 of the laws of that year, together with ch. 274 of the laws of the same year, authorizing villages to issue bonds for public purposes, constitutes a revision of the law on the subject, and impliedly repeals so much of sec. 943 as imposes additional conditions upon the exercise of the power. That a statute which revises the whole subject-matter of a former statute works a repeal of the former statute, without express words to that effect, is well settled. *Dane Co. v. Reindahl,* 104 Wis. 302, 80 N. W. 438. The question is, therefore, whether the laws of 1893 were intended to, and do in fact, revise the law on the subject of the issuance of municipal bonds for the purposes named in them.

There are certainly considerations of considerable force in favor of this view. The fact that a proviso was inserted in sec. 133 requiring ratification of the ordinance by vote of the people in all cities under the general charter containing a population of less than 5,000 is pointed out as manifestly inconsistent with the idea that an election must be held in all cities before the issuance of any bonds, and as involving the absurdity of demanding two elections upon the same subject in cities containing a population of less than 5,000. The fact that the limitations imposed by sec. 943 are nowhere mentioned in either of the laws of 1893, but that specific provisos are inserted in both, requiring a certain vote of the council, in a manner indicating that such a safeguard was deemed sufficient, is also urged. Again, it is said that the law has been practically construed, that many cities have issued and sold bonds based simply on compliance with the requirements of the Laws of 1893, and that, if it be held that the provisions of sec. 943 are applicable, great mischief would be done. It is argued, also, that this court, in the cases of *Ellinwood v. Reedsburg,* 91 Wis. 131, 64 N. W. 885; *Johnson v. Milwaukee,* 88 Wis. 383, 60 N. W. 270, and *Burnham v. Milwaukee,* 98 Wis. 128, 73 N. W. 1018, has practically construed the Laws of 1893 as controlling and exclusive. It may be said at once, with regard to this last contention, that in neither of the cases cited was the question now before us raised, debated, nor decided. On the other hand, it is said that sec. 943 is framed in the most positive words of command,—"No bonds shall *in any case* be issued by any town, village or city until" the affirmative vote of the electors has been had; that no later legislation should be construed to repeal such mandatory legislation, designed for the curbing of the reckless borrowing of money, unless the purpose to repeal be clearly expressed, or the acts be absolutely irreconcilable; that neither the provisions of ch. 311 nor ch. 312 are necessarily in conflict with sec. 943, nor inconsistent with it, but may be reason-

ably construed as simply throwing another safeguard about the public treasury; that the provisions of chs. 311 and 312 are nowhere declared to be exclusive, or to repeal the provisions for popular vote under sec. 943, although the subject of a popular vote was under consideration as evidenced by the requirement of a vote upon the bond ordinance in cities of less than 5,000 population, industriously inserted in sec. 133 at this time; and finally the fact that all of these laws, with some important amendments (especially to sec. 943), were inserted in the Statutes of 1898. These last-named statutes, while not denominated "Revised Statutes," are such in fact. The act is entitled "An act to revise the General Statutes," and was intended to be a revision of the entire body of the general laws of the state. *Dane Co. v. Reindahl, supra.* All of these considerations urged by the respondent are of weight, but especially the last one named. When the legislature was engaged in making a complete revision of the general law of the state, it must, of course, be presumed that they had in mind the existing state of the law, and that they did not intentionally insert in the revision inconsistent or repugnant provisions. It is certain, also, from inspection of the various sections in question here, that they did not pass over them carelessly, nor reinsert them inadvertently. They made numerous changes in all of them, some of which were merely verbal, but others were of a material nature. In sec. 133 they added an additional public purpose for which bonds might be issued, namely, "such other purposes as are authorized by these statutes." They also inserted a specific requirement for the levy of a direct tax to pay the principal and interest within twenty years, as required by sec. 3, art. XI, Const. In combining secs. 1, 2, and 3 of ch. 311 into one section, known as "section 926—11," they eliminated the clause confining its application to cities of more than 3,000 population, and inserted the constitutional requirement as to the levying of a tax, and a requirement that the bonds should contain a recital

of the fact that such tax had been provided. In sec. 942 they inserted a clause authorizing the issuance of bonds for certain additional public purposes. In sec. 943 they left the imperative mandate that "no bonds shall *in any case* be issued" without a previous vote of the people still standing, and added a general clause at the end which seems of the utmost significance. There had been no general and uniform law regulating the manner of holding the election in cities, but by ch. 274, Laws of 1893, a general provision prescribing the manner of holding such elections in villages had been enacted. The legislature evidently deemed that it would be well to have a uniform method which should be applicable to cities as well, and they therefore added to sec. 943 an entirely new subdivision, prescribing the manner of holding such elections in towns, villages, and cities, prefacing the same with the following sweeping provision:

"Unless it is otherwise expressly provided by law no town, city or village shall issue any bonds .. . . unless upon compliance with the following conditions: [Here follow specific directions as to the manner of holding the elections.]"

As to this last addition to sec. 943, it is said, in effect, by appellant's counsel, that it really is a limitation on the necessity of holding elections to cases not otherwise provided by law, and that secs. 925—133 and 926—11 do otherwise provide; hence that cities covered by those sections are expressly relieved from holding elections previous to the issuance of bonds for any of the purposes named in those acts. We cannot agree to this construction. The proviso is out of place if this construction be the correct one. It should be at the beginning of the section. Standing where it does, it is plain that it refers only to the method of holding the election, and simply excepts from the operation of this method those cities (of which there are some in the state) which have special charter provisions governing the manner of holding such elections.

In any view which we have been able to take of the subject, we have not been able to perceive how we can escape from the plain and imperative mandate of sec. 943, which has stood upon the statute books of the state for many years, which is not essentially inconsistent with any of the other statutes relied on, which has never been repealed in direct words, and which has so recently been reincorporated *in hæc verba,* after careful consideration and rewriting, in the general body of the laws of the state. Cumbrous it may be, and inconvenient it may also be, especially for those who desire to make expensive city improvements to be paid for by future taxpayers; but the answer must be that the court cannot set aside statutes on the score of inconvenience or clumsiness, nor can it violate a plain and valid legislative mandate on the ground that it is burdensome or unnecessary.

So far in this opinion we have not considered the question whether sec. 925—133 of the general charter has become a part of the charter of the city of *Appleton* by virtue of the provisions of the limitation law (ch. 165, Laws of 1899), notwithstanding its supposed adoption by the city was incomplete and insufficient. This question has not seemed vital, because sec. 925—133, governing cities under the general charter, and sec. 926—11, governing cities under special charters, both authorize the issue of bonds for waterworks, and are equally subject to the provisions of sec. 943 if either is subject thereto, and hence it seemed to make no difference in the result of this litigation whether the city was acting under one section or the other.

There is one contention made by the appellant, however, which demands some notice of this question. The claim is that, by virtue of the attempted adoption and the operation of the limitation statute, sec. 925—133 has become a part of the special charter of the city of *Appleton.* Sec. 4987, Stats. 1898, provides that "none of the general provisions of these Revised Statutes shall be construed so as to affect or repeal

the provision of any special acts relating to particular cities unless such acts are enumerated in the acts hereby repealed," and hence *Appleton* is not affected by the provisions of sec. 943. The fault in the reasoning is manifest. Even if the section in question has become a part of the municipal law of *Appleton* (which, however, we do not decide), it has not become and cannot become any part of any special law relating to *Appleton,* nor to any particular city. It is still a part of the general law, which has not been changed in character by the fact that a city has chosen to adopt it. Nor can sec. 926—11 be called a "special" act. It is a general law applying to a valid legislative class of cities, namely, all cities operating under a special charter. *Johnson v. Milwaukee,* 88 Wis. 383, 60 N. W. 270. So we still find it unnecessary to decide the question whether sec. 925—133 is a part of the charter of the city of *Appleton;* nor does it seem to be a very important question, in view of the great similarity between the provisions of that section and the provisions of sec. 926—11.

With regard to the argument that great mischief will result from this conclusion, because, doubtless, many municipal bonds have been issued without a vote of the people, we shall say but little. In the first place, we have no knowledge that such has been the fact; but, even if it be true, it cannot justify the courts in overriding plain and imperative statute law. In cases of extreme doubt, such a consideration might be weighty; but, in a case where the law is certain, frequent and long-continued violation affords no ground for disregarding it.

By the Court.—Order affirmed.

COMSTOCK, Appellant, vs. FRATERNAL ACCIDENT ASSOCIATION OF AMERICA, Respondent.
SAME, Respondent, vs. SAME, Appellant.

December 20, 1902—January 13, 1903.

Accident insurance: Notice of loss, when required? Classification of occupations: Hazards: Appeal and error: Motion for correction of verdict: Reversal.

1. The stipulation in a policy of accident insurance provided that the insured should give notice to the insurer within ten days of the accident with full particulars, or all claim to indemnity or benefit thereunder should be forfeited. *Held*, that notwithstanding the mandatory language of such a policy requiring such notice as a condition precedent to the right to recover, it should be read with an exception saving the rights of the assured from forfeiture for a failure to comply therewith, where he is totally incapacitated from acting in the matter. Such rule, however, would not apply where there is unequivocal language in the policy inconsistent therewith.
2. An accident insurance policy provided that if the assured was injured while engaged in any "occupation or exposure" more hazarous than that against which he was insured, his insurance should be such as the premium paid would purchase at the rates fixed for such increased hazard. "Occupations" were classified but exposures were not. Explanation was made that merely riding a bicycle for pleasure was not an "occupation," and that a person insured as in occupation a proprietor of a manufacturing industry did not change his status by incidentally riding a bicycle for recreation, or in going to or from his place of business. The policy of insurance in question specified plaintiff's occupation as proprietor of a chair factory and office duty. *Held*, that it was error to treat the act of plaintiff in incidentally riding a bicycle for pleasure as placing him in a different class, as to hazard, from that named in the policy.
3. Where error is committed and no motion is made to correct the verdict in that respect and for judgment thereon as corrected, the supreme court on reversal will remand for a new trial.

APPEALS from a judgment of the county court of Winnebago county: C. D. CLEVELAND, Judge. *Reversed.*

Action to recover on an accident insurance policy. The complaint stated two causes of action; one for $25 per week for twenty-seven weeks for disability caused by a fall from a bicycle, and one for $25 per week for twenty-three weeks for disability caused by a fall on a sidewalk, where plaintiff was walking by the aid of a crutch, he not having fully recovered from his first injury. The certificate of insurance specified plaintiff's occupation as proprietor of a chair factory, and office duty. It insured him for $25 per week for not exceeding fifty-two weeks, as follows: For loss of time resulting from bodily injury effected during the life of the certificate "through external, violent and accidental means, which shall independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated, . . . except that if the insured is injured while engaged temporarily or otherwise in any occupation or exposure classed by this association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premium paid by him will purchase at the rates fixed for such increased hazard." On the face of the certificate it was conditioned upon acceptance by the assured of "the conditions contained in this certificate as a basis of this contract," payment to be subject to the "conditions in his certificate contained and indorsed on the back hereof." Among such indorsed conditions was this:

"Written notice shall be given the said association at Westfield, Mass., within ten days of the date of the accident, and injury for which claim of indemnity or benefit is made, with full particulars thereof, including a statement of the time, place and cause of the accident, the nature of the injury and the full name and address of the insured and beneficiary, and unless such notice and statement is received as aforesaid, all claim to indemnity or benefit under this certificate shall be forfeited to the association."

The issues presented for consideration in the circuit court were: (1) Was the condition on the back of the certificate a part of the contract of insurance? (2) Was the notice of the first injury given in time? (3) Was the notice of the second injury given in time? (4) If plaintiff was entitled to recover at all on the first cause of action, was he entitled to recover $25 per week? (5) Was the second injury caused by external, violent and accidental means independently of all other causes, immediately and wholly disabling the plaintiff from transacting any and every kind of business pertaining to his occupation stated in the certificate?

At the close of the evidence defendant's counsel moved for the direction of a verdict, which was denied. Plaintiff also moved for the direction of a verdict, for $25 per week for twenty-seven weeks, which was also denied. The court then directed verdict in plaintiff's favor for $10 per week for twenty-seven weeks, with interest. Judgment was rendered accordingly. Both sides appealed, plaintiff claiming that he was entitled to recover $675, being $25 per week for twenty-seven weeks, with interest; and defendant that upon the undisputed facts of the case notice of the accident was not sent to it in time, and that therefore all claims under the certificate were forfeited.

F. W. Houghton, of counsel, for the plaintiff.

For the defendant the cause was submitted on the brief of *Phillips & Hicks.*

MARSHALL, J. If the plaintiff, because he was made unconscious by the accident depriving him of ability to comply with the condition of his policy as to giving notice to defendant within ten days of the date of such accident, was not required to do so under the terms of the insurance contract, but permitted to give such notice as soon as ability in that regard was restored, the motion for the direction of a verdict in favor

of defendant was properly denied, and plaintiff was entitled to recover at least the sum for which judgment was rendered.

It may safely be admitted that there is some conflict of authority as to whether, under any circumstances in a case like this, liability can survive failure to comply with the requirement as to notice. The overwhelming weight of authority, we may safely say, however, is in favor of plaintiff's position. The reasoning of courts supporting conclusions in that regard are far from being harmonious or satisfactory. However, when the contract in question was made, the law was deemed so well settled that, notwithstanding the mandatory language of a policy requiring some act to be done as a condition precedent to the right to recover for a loss, it should be read with an exception saving the rights of the assured from forfeiture for a failure to comply therewith where he is totally incapacitated from acting in the matter, that we hold the parties here entered into the contract in contemplation thereof, and that language to that effect became a part of the instrument the same as if it were plainly embodied therein, though it violates the literal sense of the words used, and regardless of whether it can be, by general rules for judicial construction, found within the reasonable scope of such words. We place our decision of this case on the ground indicated, rather than upon the reasoning found, in general, in the opinions of the courts that have passed upon such matters. We do not feel justified in saying, as some courts have, that the contract must necessarily be held to mean something different from the literal sense thereof, merely because otherwise the parties would be convicted of stipulating for an impossibility, or because, otherwise, a great hardship would be inflicted upon the assured, or because forfeitures are not favored by courts and should not occur where any other result can be reached within the reasonable meaning of the contract, or because a contract should not be so construed as to stipulate for

the performance of an act which is impossible, or because an act of God excuses nonperformance of a contractual act. Parties may bind themselves by an agreement to perform an act without guarding against conditions rendering compliance therewith impossible, if they see fit, or bind themselves by harsh provisions in a contract. Again, the rule that an act of God excuses nonperformance of a contract does not apply to contracts of the nature of the one before us. The operation of the latter rule, generally, is limited to obligations arising by operation of law, and to liability of common carriers. It does not extend, universally, to express contracts. 1 Am. & Eng. Ency. of Law (2d ed.) 58, and cases cited. Subject to some exceptions which do not include, generally speaking, impossibility of performance, parties to an express contract must perform according to their agreement, or take the consequences implied by law or agreed upon. *Cook v. McCabe,* 53 Wis. 250, 10 N. W. 507; *Bacon v. Cobb,* 45 Ill. 52; *Dewey v. Union School Dist.* 43 Mich. 480, 5 N. W. 646; *Doster v. Brown,* 25 Ga. 24; *Ames v. Belden,* 17 Barb. 515; *Randall v. Johnson,* 59 Miss. 317; *School Trustees v. Bennett,* 27 N. J. Law, 513. It will not do in a case like this to ground a decision on the doctrine that language will not be so construed as to effect a forfeiture if that can be avoided, without going further and showing that it can be avoided by ascribing some meaning to the words involved which is within the reasonable scope thereof under the circumstances, or by a legitimate application of some rule of law. It will not do to ground a decision on the rule that courts will not decree or permit or enforce a forfeiture if that can be avoided, without satisfying the last element of the proposition by some recognized principle of law. Courts can only enforce lawful contracts according to the contractual intent of the parties thereto so far as the same can be found expressed in their language taken in its literal sense or viewed in the light of established legal principles,

regardless of consequences to either party. In this case, if the failure of the assured to comply with the requirement of his policy as to giving notice to the defendant within ten days after the accident under the circumstances falls within the unqualified stipulation of the policy that for nonperformance of the condition as to notice all claims to indemnity or benefit under the certificate shall be forfeited to the association, and there is no implied exception which by rules of law forms a part of the contract, rendering the forfeiture clause inoperative where performance of the condition is impossible, as was the case here, the consequences, however unfortunate to the assured, will not justify the court in giving him the benefit of a contract and imposing one on the insurer which the parties never made.

A case often referred to, holding that impossibility to perform a condition precedent to recovering upon a policy of insurance by the person required thereby to act in the matter, such impossibility being caused by his incapacity to act through insanity or other cause, excuses such nonperformance, and that an exception to that effect could, as a matter of law, be read out of the policy where there is no express stipulation against it, as one in contemplation of the parties at the time of making the contract, is *Insurance Cos. v. Boykin,* 12 Wall. 433. The court there said, without supporting the position taken by reference to any established rule for construing contracts, that insanity is an excuse for neglect to perform by the assured a condition required by the terms of his policy of insurance. It was suggested that a different rule would be "too repugnant to justice and humanity to merit serious consideration." The court probably did not use that language as a justification for making for the parties a different contract than they themselves entered into, but as a reason for looking beyond the literal sense of words for some other signification that could be adopted without violation of rules of language or of law, and which would avoid a seeming absurdity. The

decision would be more satisfactory had the court stated some established rule to justify its conclusion. Certainly, as before indicated, mere inability to perform a contract on the part of one of the parties thereto does not universally excuse performance (Hammon, Cont. 833); and generally, when one imposes a duty by contract upon himself, impossibility of performance from any cause does not constitute excuse for nonperformance. *The T. B. Harriman,* 9 Wall. 172; *Beebe v. Johnson,* 19 Wend. 500; *Harrison v. Missouri P. R. Co.* 74 Mo. 371; *Stees v. Leonard,* 20 Minn. 494; *School Dist. No. 1 v. Dauchy,* 25 Conn. 530; *Jones v. U. S.* 96 U. S. 29. Like all good rules, there are several exceptions to the one suggested, and some one or more of them the court must have had in mind in rendering the decision in *Insurance Cos. v. Boykin.* One of such exceptions is that an agreement to do a thing clearly impossible upon the face of the contract, and existing at the time of making the same, is void. Hammon, Cont. 415. Another is that impossibility of personal performance of a contract, occurring subsequent to the making thereof, it being clear that no other performance was contemplated by the parties, as a matter of law is not included in the terms. *Dickey v. Linscott,* 20 Me. 453; *Johnson v. Walker,* 155 Mass. 253, 29 N. E. 522; 7 Am. & Eng. Ency. of Law (2d ed.) 147. Such exception, however, does not apply where the circumstances are such that the promisor should have foreseen and provided against inability to perform. *Jennings v. Lyons,* 39 Wis. 553. It would be a reasonable application of such rule to hold that it covers a situation such as is presented by the facts of this case and those in *Insurance Cos. v. Boykin.* The fair interpretation of the requirement as to notice may well be said to be that the parties contemplated notice by the assured, though probably a notice by some one in his behalf, if necessary, would have been sufficient. However, as indicated, it may reasonably be assumed that personal performance was what the parties had in mind. In that view,

Insurance Cos. v. Boykin falls within a well-recognized exception to the general rule that impossibility of performance by a contracting party does not excuse nonperformance. The exception, it will be noted by an examination of the authorities, is worked out in some cases upon the theory that without express words to the contrary, notwithstanding the literal sense of the words, an agreement to do the impossible under the circumstances cannot be reasonably said to have been in the minds of the parties at the time of entering into the contract, hence cannot be held to have been included in it; in others on the theory that the positive words of the contract should be read with an exception avoiding the absurdity of an agreement to do that which would be under all circumstances impossible, not because such exception can be found suggested in the words of the contract, but because the contract should be read in the light of established principles of law to that effect, existing at the time the contract was entered into, there being no clear negative thereof in the instrument. The subject might be discussed at great length in the elucidation of the principles involved, and authorities collated in large numbers, but it is not thought profitable to go further than to declare, with fair support for the declaration, that at the time the contract in question was made the language used did not, as a matter of law, include a stipulation requiring compliance with the condition as to notice under the circumstances of this case, and that the adjudications of courts in the matter have support in fundamental principles of the common law.

But without further discussion of the matter, and without adopting in many respects the reasoning found in some of the cases, it is considered that a requirement in a contract of insurance that the insured shall, after suffering loss, perform some act as a condition precedent to the right to recover therefor, does not include cases where performance is prevented without fault of the assured, because of his being incapacitated to act in the matter; that in such cases the assured will

not forfeit his insurance if he performs the stipulated act within a reasonable time after mental capacity to do so shall have been restored to him, this of course not to apply where there is unequivocal language in the contract inconsistent therewith,—language requiring performance of the stipulated act at all events; that the holdings of courts, justified by elementary principles, were so uniformly that way at the time of the making of the contract in question as to establish a rule which became a part thereof. The following are but a few of the cases bearing upon the subject: *Phillips v. Benevolent Soc.* 120 Mich. 142, 79 N. W. 1; *Globe Acc. Ins. Co. v. Gerisch,* 163 Ill. 625, 45 N. E. 563; *McFarland v. U. S. Mut. Acc. Asso.* 124 Mo. 204, 27 S. W. 436; *Odd Fellows F. A. Asso. v. Earl,* 70 Fed. 16; *Mandell v. Fidelity & C. Co.* 170 Mass. 173, 49 N. E. 110; *Anoka L. Co. v. Fidelity & C. Co.* 63 Minn. 286, 65 N. W. 353; *Matthews v. Am. Cent. Ins. Co.* 154 N. Y. 449, 48 N. E. 751; *Solomon v. Continental F. Ins. Co.* 160 N. Y. 595, 55 N. E. 279; *Peele v. Provident Fund Soc.* 147 Ind. 543, 44 N. E. 661, 46 N. E. 990; *Trippe v. Provident Fund Soc.* 140 N. Y. 23, 35 N. E. 316; *Towel v. Insurance Co.* 21 Mich. 219, 226; *McNally v. Phœnix Ins. Co.* 137 N. Y. 389, 33 N. E. 475.

From what has been said plaintiff must prevail on defendant's appeal, and we have left to consider, upon plaintiff's appeal, whether the court erred in not directing a verdict in his favor for $25 instead of $10 per week. That depends on whether, by reason of the fact that plaintiff was incidentally riding a bicycle at the time he was injured, this language of the policy was rendered operative:

"If the insured is injured while engaged temporarily or otherwise in any occupation or exposure classed by this association as more hazardous than that here given, his insurance and weekly indemnity shall only be so much as the premium paid by him will purchase at the rates fixed for such increased hazard."

In determining that we must look to the contract, not to oral evidence of its meaning. It speaks of a classification of occupations and exposures, but the manual of the association in which the classification is found does not mention mere exposures. It shows only a classification of occupations, in connection with an explanation to the effect that merely riding a bicycle occasionally for pleasure is not an occupation, and that a person insured as in occupation of a proprietor of a manufacturing industry does not change his status by merely incidentally riding a bicycle for recreation or in going to or from his place of business. On the outside front cover of the manual are these words: "Occupations Classified, &c." The headline in the manual, to the classification, is as follows: "Classification of Occupations." The case on this branch of it is ruled by *Fox v. Masons' F. A. Asso.* 96 Wis. 390, 397, 71 N. W. 363. The court erred in treating the act of the assured in incidentally riding a bicycle for pleasure as placing him, for the time being, in a different class as to hazards insured against from the occupation named in the policy. The verdict should have been directed for $25 per week.

No motion having been made to correct the verdict and for judgment thereon, as required under the established practice, the case must go back for a new trial.

By the Court.—The judgment is reversed and the cause remanded for a new trial, plaintiff to have costs as prevailing party upon each appeal.

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BOSTWICK, Respondent, vs. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Appellant.

February 24—March 11, 1902.

September 6, 1902—February 3, 1903.

Life insurance: Contracts: Fraud: Waiver: Presumption from signing written instrument: Failure to read: Ignorance of contents of written instrument: Negligence: Acceptance of performance: Reasonable time: Contributory negligence: Defenses: Constructive notice: Rescission: Recovery of consideration: Laches: Appeal and error: Actions tried by court: Practice: Mandate on reversal.

1. Plaintiff agreed for a policy of life insurance but received one different from that contracted for. On receiving the policy he threw it into a drawer in his desk, without examination, although a casual glance at the policy and accompanying letter would disclose that it was not the policy he expected. Several months afterward, on discovery of the different character of the policy, plaintiff for the first time objected, and brought action to recover the premium paid. *Held*, that the fraud, if any, was waived, and the policy accepted.

On rehearing: Syllabus by MARSHALL, J.:

2. A person who, in a business deal with another, signs a written instrument, is conclusively presumed, as to that other and all persons claiming under him through such instrument, to know the contents thereof, no fraud or deceit being used by such other or by any one for whose conduct he is responsible, reasonably calculated to and which does induce such person to become a party to such instrument without reading it.
3. If a person, by the fraud of another, or of some one for whose conduct he is responsible, becomes a party to a written instrument without reading it or personally knowing the contents thereof, he is not precluded thereby from obtaining judicial redress in some form of action, for any injury which may be thereby caused to him through such instrument not being what he supposed it to be.
4. Mere ignorance of the contents of a paper by one who becomes a party thereto under a mistake as to its import, will not enable him to avoid his act.

5. The doctrine that a person is not inexcusably negligent in signing a paper in a business transaction with another, relying upon positive false statements on the part of that other or of some one for whose conduct he is responsible, as to its import, applies only where the deceit is practiced at the time, and in the transaction, of such signing.
6. If a person contracts with another for an article to be delivered or gives an order therefor, and thereafter a thing is delivered to him ostensibly in compliance with the order or fulfillment of the contract, unless, at the time thereof or within a reasonable time thereafter, he notifies such other that such article will not be accepted as satisfying the contract or order, he will be conclusively presumed to have waived all departures therein from the thing bargained for which are obvious to the senses by ordinary exercise thereof. This is subject to what follows.
7. The reasonable time mentioned in the foregoing rule commences to run from the time the person receiving the article has reasonable opportunity to observe its defects, unless the opposite party, by fraud or deceit, prevents such person from examining it or induces him not to do so; but such person cannot successfully refer merely to deception practiced upon him at the time of his giving the order or entering into the contract, to excuse failure to observe obvious departures in the thing delivered from that bargained for, at or within a reasonable time after the delivery.
8. Upon the reception of an article by a person under the circumstances stated in the two foregoing rules, nothing occurring then for which the opposite party is responsible, reasonably preventing him from using, or inducing him not to use, his senses so as to discover obvious departures therein from the thing bargained for, the rule applies that the law requires men, in their dealings with each other, to exercise proper diligence and apply their attention to those particulars which may be supposed to be within reach of their judgment, and not to close their eyes to means of information which are accessible to them. *Vigilantibus et non dormientibus jura subveniunt.*
9. The rule that contributory negligence is not a defense to an intentional wrong does not apply to a situation where negligence is so inexcusable as not to be really a contributing cause, but to be really a cause intervening between the wrong and the injury as the real producing cause thereof.
10. He who is inexcusably negligent in a business transaction forfeits the right to judicial remedies for relief, and not because of any favor or indulgence which the law extends to the wrongdoer, but because of failure on the part of the injured person to

exercise that care for his own protection which the policy of the law requires as a condition of its protection, such policy being to aid only those who exercise some reasonable care to guard their own interests.

11. Negligence of a person in not asserting his right against another by whom he has been defrauded in a business transaction, is not a defense, strictly so called, to an action on the former's part for redress, but is evidence of submission to or waiver of the wrong, more or less strong according to the circumstances, and may be conclusive evidence thereof; or, it may be so gross as to forfeit such person's right to judicial redress; or, in connection with some injury to the wrongdoer, it may operate to estop such person from claiming redress for the wrong first inflicted.

12. If a person, in a business transaction with another, is deceived by the latter to his injury, such person may rescind the transaction within a reasonable time after he discovers or has reasonable opportunity to discover the fraud, constructive knowledge thereof being just as effective as actual knowledge to set the time for rescission running and to mark its limits.

13. If a person receives a policy of insurance ostensibly in response to an application therefor, which he signed and parted with in the belief, induced by the fraud of the agent taking the same, that it called for a policy different from that which it called for in fact, he is bound as a matter of law to examine the policy within a reasonable time after it comes to his hand, and to discover obvious departures therein from the one which he supposed he was to get, and promptly, upon discovering the same, to rescind the transaction, give the company due notice thereof, and do all on his part which justice requires to restore the former situation, or he will be held to have accepted the policy as satisfying his application, so as to be precluded from rescinding the same.

14. The reasonable time, for discovering that the policy differs from the one supposed to have been applied for in the circumstances stated in the foregoing rule, commences to run immediately upon the reception of the paper, nothing occurring then to reasonably excuse the applicant for omitting to examine his contract. In such circumstances four and one half months' delay in discovering the fraud and exercising the right of rescission is, as a matter of law, too long a time.

15. If, in the situation stated in the last foregoing paragraph, the element be added of the applicant for insurance being fraudulently deterred from examining his policy by something occurring at the time of the delivery thereof to him, four and one half

months' delay in discovering the fraud is not, as a matter of law, so long as to forfeit the right of rescission.

16. The existence of a cause of action at law to recover the consideration parted with upon a contract, on the ground of fraud, presupposes the actual termination of the contract because of the fraud, and that requires a repudiation of such contract by the insured person *in toto*, or so far as justice may require, and an unconditional offer on his part, so far as justice may require, to restore the wrongdoer to his former situation, or a waiver of such offer by such conduct on the latter's part as to clearly indicate that a tender to him of that which he parted with in the transaction would be useless because he would not accept it.

17. If a judgment in an equity case or an action at law tried by the court be reversed on appeal to this court, and there is an unsolved question of fact that must be determined before final judgment can be rendered, and there are conflicting reasonable inferences as to how such issue should be solved, rendering it doubtful which way is the right of the matter, lest injustice may be done by the exercise of jurisdiction to decide the issue here as an original matter, the court will remand the cause to the trial court to determine such issue and then to apply the law to the case as directed.

CASSODAY, C. J., dissents.

APPEAL from a judgment of the circuit court for Rock county: B. F. DUNWIDDIE, Circuit Judge. *Reversed.*

Action to recover money paid to defendant for three insurance policies. Plaintiff claimed that George S. Parker, Arthur H. Barrington and himself were each fraudulently induced to sign an application for an insurance policy of a different character than he intended; that each, as soon as he discovered the fraud, repudiated the transaction; and that Parker and Barrington thereafter, and before the commencement of this action, assigned to plaintiff their claims for the return of the money paid to the defendant. The answer put in issue all the allegations constituting the alleged fraud. There was evidence tending to show that defendant's agent and plaintiff negotiated, from time to time for several days, in respect to the latter taking a $10,000 policy of life insurance in the defendant company; that the agent strongly recommended what he called a "five per cent. debenture

policy"; that plaintiff, from first to last, insisted that he did not want a policy that could not be paid up in ten years; that he would take a ten-payment policy and no other—one that would be fully paid in ten years; that the agent, from first to last, continued to recommend a five per cent. debenture policy, but did not say that such policy would require annual payments for life; that finally the agent said he would obtain for plaintiff what the latter wanted, and made out an application, representing that it was in accordance with the latter's wishes; that plaintiff had the paper in his possession for a considerable length of time and had ample opportunity to read and understand it, but did not do so, relying entirely upon the belief that the agent had written it in accordance with the understanding which had been reached; that the policy was received about April 1, 1897, accompanied by a letter, the opening lines of which were to the effect that it was a five per cent. debenture annual premium payment policy, such as the agent had urged plaintiff to take; that the letter further explained that the payment upon the policy would be $2 less per year than had been talked, and that $2 had been credited to plaintiff because he had given his paper for $1,064 when $1,062 was the proper amount; that when plaintiff received the policy he threw it into his drawer and did not examine it or pay any attention to it to discover whether it was according to his understanding or not; that circumstances led him to examine the policy sometime thereafter, and that about August 22, 1897, he discovered that it was entirely different from the policy he was to obtain; that he thereupon notified defendant's agent of such fact and demanded an explanation; that considerable correspondence was subsequently had between plaintiff and the agent, resulting in an absolute repudiation of the policy by plaintiff on March 19, 1898. The evidence tended to show that Parker desired the agent to obtain for him a twenty-payment policy; that he signed an application without reading it, supposing the agent had writ-

ten it according to his request; that when his policy came he put it away without reading it and did not examine the paper or discover that it was not in accordance with his understanding, till about five months after it was received; that he then rescinded the insurance contract as far as it was possible for him to do so. The testimony as to Barrington was substantially the same. The evidence on the part of defendant was to the effect that the several applications for insurance were made in accordance with the understanding between the applicants and the agent and that the policies were issued accordingly. The court decided that the application made by plaintiff was written by the agent and signed by plaintiff without his reading it, though he was perfectly competent to do so and to understand it, and that he had ample opportunity therefor; that the reason why he did not do so was because he relied upon the agent to write it in accordance with his request; that plaintiff desired the agent to write the application for a ten-year annual payment policy, which he agreed to do; that he received the policy about April 1, 1897; that it was an annual premium policy, but that he did not discover that fact till August 22, 1897; that within a reasonable length of time thereafter he tendered the policy back to defendant and demanded a restoration of his money and notes. The circumstances as to Parker and Barrington are of the same character. Before the commencement of this action they assigned their claims for restitution to plaintiff. The conclusion of law reached was that plaintiff was entitled to recover of the defendant the money paid on the several policies, aggregating $1,401.50, with interest upon each such payment from the time it was made with costs. Judgment was rendered accordingly.

For the appellant there was a brief by *Fethers, Jeffris & Mouat,* and oral argument by *M. G. Jeffris.*

For the respondent there were briefs by *Ruger & Ruger,* and oral argument by *Wm. Ruger.*

The following opinion was filed March 11, 1902:

MARSHALL, J. Two propositions are presented for consideration: First, were the applicants for insurance bound by their applications because of their failure to know what they signed? Second, did the retention of the policies by the applicants for several months, without objection, constitute an acceptance thereof and waive the fraud, if there was fraud, in securing the applications? The learned counsel for respondent devoted nearly all their printed argument, as they did nearly all their oral argument, to the first proposition. As we do not think it is necessarily decisive of the case, we shall assume that in deciding it the trial court did not err. On the second proposition the court held that the applicants did not accept the policies because they repudiated them within a reasonable time after knowing that the instruments were not what they supposed their applications called for; that the mere retention of the policies without such knowledge did not constitute an acceptance. Appellant's counsel contend that when the policies were received the applicants were, as ordinarily prudent persons, put upon inquiry as to the character thereof, that they should have examined the policies, and that their failure to do so, and retention thereof for several months before making any complaint, was an acceptance of them as fulfilling the applications as they supposed such applications were made, and a waiver of fraud, if there was fraud, in obtaining the same.

As we view the turning question above suggested, the law has been firmly settled in favor of appellant, and has been applied by this court in many cases. It does not militate, as counsel for respondent seem to think, against the maxim that a person cannot take advantage of his own wrong, but enforces that other one, which is quite as well established, that the court will not constitute itself the guardian of persons of mature age and ordinary intelligence, protecting them against

the results of their own negligence; that it will not furnish a person a remedy for a wrong where he cannot prove a legal claim for damages without showing that his own negligence intervened between the act of the alleged wrongdoer and the result complained of, and was the real, efficient, producing cause of his injury; that in such a case it will be conclusively presumed that he voluntarily accepted the situation, because, if he had used ordinary care, the injury complained of would have been prevented. Applying that in the decision of the cases, it has been repeatedly held that if a person contracts for an article to be delivered, and delivery is made ostensibly in fulfillment of the contract, under such circumstances that he has ample opportunity to test the thing delivered by the contract, he is put upon inquiry as to all departures therefrom which are open and obvious to ordinary inspection; that he is bound to see those things which are plainly observable and is charged with knowledge thereof from the time he ought, in the exercise of ordinary care, to have discovered them; and that if he does not, within a reasonable time thereafter, give notice that the thing delivered is not accepted as satisfying the agreement to purchase, he will be deemed to have accepted it and waived obvious departures from the agreement if there are such. Counsel for respondent vigorously attack that doctrine, but it is too firmly intrenched in our jurisprudence, and in the law generally, to be open to question.

The first case in which the principle above stated is distinctly declared in the decisions of this court is *Locke v. Williamson,* 40 Wis. 377. The court there said:

"We have concluded to hold this rule in respect to an executory contract: that when the defects in the goods are patent and obvious to the senses, when the purchaser has a full opportunity for examination, and knows of such defects, he must, either when he receives the goods or within what under the circumstances is a reasonable time thereafter, notify the seller that the goods are not accepted as fulfilling the warranty; otherwise the defects will be deemed waived."

In subsequent cases that rule was considerably expanded in accordance with the current of authority, to the effect that reasonable opportunity for obtaining knowledge is equivalent to knowledge, as the following citations will show. In *Mamlock v. Fairbanks,* 46 Wis. 415, 1 N. W. 167, it was said that present means of knowledge must be considered; that the doctrine that one must observe what he has reasonable opportunity for knowing in matters of contract is within the rule of *caveat emptor;* that the law for the protection of persons against fraud will not be extended to those who, "having the means in their own hand, neglect to protect themselves;" that "the law requires men, in their dealings with each other, to exercise proper vigilance, and apply their attention to those particulars which may be supposed to be within reach of their observation and judgment, and not close their eyes to the means of information which are accessible to them." *"Vigilantibus non dormientibus jura subveniunt."* In *Warner v. Benjamin,* 89 Wis. 290, 62 N. W. 179, it was held that, if a person is put upon inquiry in respect to the quality of a thing offered for sale to him, he is bound to know what is discoverable in regard thereto by the exercise of ordinary care; that he cannot "close his eyes to defects which are before him or to the information which is at hand." In *Farr v. Peterson,* 91 Wis. 182, 64 N. W. 863, it was held that, 'if the defects in the subject-matter of the contract are patent and should be discerned by the exercise of ordinary diligence, the purchaser is bound to discover them at his peril; that in dealings between individuals each is bound to apply his attention reasonably to the subject-matter thereof and to discover those things which are within reach of ordinary observation and judgment, and which they are not prevented from discovering by artifice or fraud.' Again, in *Thompson Mfg. Co. v. Gunderson,* 106 Wis. 449, 453, 82 N. W. 299, it was held that if an article is delivered in fulfilment of an executory contract, and the receiver thereof has full opportunity for

examining the same and observing variations therein from the article contracted for, and fails within a reasonable time to give notice that the article is not accepted as fulfilling the contract, the variances, if any, will be deemed waived.

It is easy to apply the foregoing to the facts of this case. The applicants for insurance had ample opportunity to examine their policies when the same were received. It was their duty to do that. An examination of the policies, even of a casual character, would have revealed all the material facts. The applicants did nothing by way of examining the papers for months after receiving them, during all of which time the defendant carried the risks it had assumed. What appears to counsel for respondent to be want of harmony in the authorities, in respect to such a situation, in the main, grows out of failure to take in the full scope of the rule that every person must use reasonable diligence for his own protection, or in confusing it with other rules with which it does not conflict. Counsel errs most grievously in the idea advanced, that negligence is never a defense in a case grounded on fraud against the wrong-doer, as the cases above cited amply show, though it is true that there are expressions in legal opinions that may be referred to in justification of the error, and later we will refer to an instance of that kind in our own decisions, and probably there are others. However, on a question so well settled, contrary statements in opinions, used *arguendo,* ought not, it would seem, to lead one astray. In 14 Am. & Eng. Ency. of Law (2d ed.) 115–117, the rule stated is supported by citations from English decisions, and from most of the states of the Union. The author says:

"This doctrine is not based upon any consideration for the party who has been guilty of the false representations, but upon the ground that public policy requires that persons shall be required to exercise at least ordinary prudence in their dealings, instead of calling upon the court to relieve them from the consequences of their inattention and negligence."

Counsel for respondent cite to our attention cases to the effect that the time for a person who receives property upon an executory contract, or who is defrauded in the making of a contract, to rescind the transaction, does not begin to run till he has knowledge of the facts. That is true, but, as we have seen, the rule does not require actual knowledge; constructive knowledge is just as efficient as actual knowledge. A person is presumed to know those things which reasonable diligence on his part would bring to his attention. If he accepts the article furnished without exercising that diligence, he does so at his peril. In that sense the maxim *caveat emptor* applies, as said in *Mamlock v. Fairbanks, supra.* The observation in *Beetle v. Anderson,* 98 Wis. 5, 73 N. W. 560, that "the rule *caveat emptor* has no application to cases of fraud," as it might be understood, is wrong. The idea which the court intended to convey is that, where a person is so circumstanced that he may, consistently with reasonable care, rely upon the representations of the person with whom he is contracting, the rule *caveat emptor* does not apply. That is, where the fraud complained of is actually produced by the wrongful conduct of the defendant, he cannot invoke the doctrine of *caveat emptor* to protect himself from the consequences thereof. But a person acts at the peril of suffering the consequences in relying upon the representations of another with whom he is contracting if the exercise of reasonable care would uncover to him the truth. Cases are cited to the effect that a person cannot profit by his own wrong. That is true as a general proposition, but it is just as true, as we have seen, that a person cannot have the protection of the law where he fails to use reasonable care to protect himself. When it is said that a person cannot take advantage of his own wrong, it is meant that he cannot do so as against a person who is injured by that wrong. The mere fact that one person relies upon false representations made by another to his injury does not constitute a cause of action against such

other. There must be a further circumstance. Such person must be induced to rely upon the fraudulent representations, and that circumstance does not exist where such person would not be so induced but for his own heedlessness.

The rule we have discussed has been applied elsewhere generally, and in many cases quite similar to the one before us, some of the more important of which are cited in the brief of counsel for appellant. In *New York Life Ins. Co. v. McMaster,* 87 Fed. 63, it was held that where a person receives an insurance policy pursuant to an application it is his duty to examine it and see those things in respect thereto which are open to ordinary observation by a person of ordinary intelligence, and that if he neglects to do so, taking it for granted that he has received what he applied for or intended to apply for, he is guilty of inexcusable negligence and in law his conduct amounts to an acceptance of the policy received regardless of whether it corresponds to the policy applied for or intended to have been applied for or not; that representations made by an insurance agent at the time of the application for a policy of insurance is made constitute no excuse for failure of the applicant to look at his policy when it is delivered to him, to see if it corresponds to the one expected, and to discover the facts in that regard if that can be done by a reasonable examination of the paper; that if one fails to read his contract under such circumstances, having full opportunity for doing so and ability to read, he is guilty of gross negligence and cannot be heard successfully to say that he kept it in ignorance of its character; that the rule in that regard applies to all contracts, insurance contracts being no exception. In *Fennell v. Zimmerman,* 96 Va. 197, 31 S. E. 22, it was held that it is the duty of a person, on receipt of an insurance policy pursuant to his application, to examine it; that he commences receiving benefits immediately upon the policy coming to his hand, and that it is his duty to examine the paper upon its receipt and to return it within a reasonable

time if it is not satisfactory, and that a failure to do so is in law an acceptance of the policy. In *McMaster v. New York Life Ins. Co.* 99 Fed. 856, cited by counsel for respondent, the doctrine in the previous case, regarding the same policy (*New York Life Ins. Co. v. McMasters,* 87 Fed. 63), was discussed at length, and it was said to apply both at law and in equity. There are many cases of like character, which might be referred to, but the principle upon which they rest is so universally recognized that we shall omit further reference to cases, except to cite *American Ins. Co. v. Neiberger,* 74 Mo. 167, as an indication of the current of authority as regards the length of time held by courts to constitute ratification of a policy not issued according to the representations of the agent, where no objection is made in that regard within a reasonable time after the assured has had a fair opportunity to read and understand it. In that case no objection was made for about three months, and it was held that the delay constituted an acceptance of the policy.

In this case the representations made to the applicants for insurance in no way prevented them from examining the policies when they were received. It was their duty to make such examination. Had they performed that duty they would have easily discovered all that they complain of. The opening lines of the letter sent appellant with his policy told the whole story. A casual glance at it would have informed him that the policy was not such as he expected to receive. Certainly he cannot, under any rule, be excused for omitting to read the first three lines of a letter addressed to him on so important a business matter, which contained other information of interest to him than that with reference to the character of his policy, viz., information in regard to the amount of his annual payment. All the parties were insured for months before appellant had any intimation that the policies were not satisfactory. It cannot be doubted that, if death had come to any of them in that period, his policy would have

been enforced. Under those circumstances the applicants for insurance must be presumed to have accepted their policies long before their attempted rescission thereof and demand for the payment of the money paid thereon. The trial court and the learned counsel for respondent fell into a grievous error in supposing that the omission by the policy holders to look at their policies can be justified by what occurred at the time the applications for insurance were made, and that as against a party charged with fraud in the making of an executory contract the injured party was not bound to object in order to preserve his rights, till he has actual knowledge; that negligence on his part in failing to make the discovery is not to be considered. The law is otherwise, as we have seen. It seems perfectly clear that plaintiff entirely failed to establish any cause of action against the defendant, and that the complaint should have been dismissed.

By the Court.—The judgment of the circuit court is reversed and the cause remanded with directions to render judgment in favor of defendant for costs.

On June 19, 1902, a motion by the respondent for a rehearing was granted.

For the appellant there was a brief by *Fethers, Jeffris & Mouat,* and oral argument by *M. G. Jeffris.*

For the respondent there was a brief by *Ruger & Ruger,* and oral argument by *Wm. Ruger.* They contended, *inter alia,* that there was no negligence in plaintiff's failing to read the applications and policies; that the plaintiff did not, either at the time of signing the application or after receipt of the policy, owe to the defendant any duty requiring him to suspect that its representations were false, and take precautions accordingly by reading the application before signing, or the policy when received; that the defendant is estopped from imputing negligence because of plaintiff's reliance upon its representations; that mere negligence in failing to guard

against injury is not a defense in favor of a party intentionally inflicting it, through false representations, or other wrong doing involving evil motive; imprudence or carelessness is not necessarily negligence in contemplation of law. *Dowd v. C., M. & St. P. R. Co.* 84 Wis. 105, 115; *Groth v. Thomann,* 110 Wis. 488, 496; 16 Am. & Eng. Ency. of Law, 466, 468, 469, 472; Shearman & Redfield, Negligence, §§ 1, 5; 1 Thompson, Commentaries on Negligence (2d ed.) §§ 1, 3, 192, 193; *Klix v. Nieman,* 68 Wis. 271; *Zieman v. Kieckhefer E. M. Co.* 90 Wis. 497; *Peake v. Buell,* 90 Wis. 515; *Kellogg v. C. & N. W. R. Co.* 26 Wis. 223, 255; *McClellan v. Scott,* 24 Wis. 86, 87; Broom's Legal Maxims, 228; Wharton, Negligence, § 131; *Terre Haute & I. R. Co. v. Graham,* 95 Ind. 293; *Strohn v. D. & M. R. Co.* 21 Wis. 554, 561; *Birdsey v. Butterfield,* 34 Wis. 52; *Warder, B. & G. Co. v. Whitish,* 77 Wis. 433, 434; *Barndt v. Frederick,* 78 Wis. 11; *Beetle v. Anderson,* 98 Wis. 5, 8, 9; *McCarty v. N. Y. Life Ins. Co.* 74 Minn. 530, 77 N. W. 426, 428; *Palmer v. Hartford Ins. Co.* 54 Conn. 509, 510; *Fireman's Fund Ins. Co. v. Norwood,* 69 Fed. 77; *Hay v. Star F. Ins. Co.* 77 N. Y. 235; *McElroy v. British Am. A. Co.* 94 Fed. 1000; *Kansas, M. O. & M. Mut. Ins. Co. v. Central Nat. Bank,* 60 Kan. 630, 57 Pac. 527; *Equitable Safety Ins. Co. v. Hearne,* 20 Wall. 494; *McMaster v. N. Y. Life Ins. Co.* 99 Fed. 856; *Duffield v. E. T. Barnum W. & I. Works,* 64 Mich. 293, 31 N. W. 314; *Nat. Bank of Dakota v. Taylor,* 5 S. Dak. 99, 58 N. W. 299; *Baker v. Lever,* 67 N. Y. 309; *Fargo G. & C. Co. v. Fargo G. & E. Co.* 4 N. Dak. 219, 59 N. W. 1067; *Strand v. Griffith,* 97 Fed. 856; *Erickson v. Fisher,* 51 Minn. 300, 53 N. W. 638; *Stanley v. M'Gauran,* L. R. 11 Ir. 331, 334, 343; *Hale v. Philbrick,* 42 Ia. 83; *C. Aultman & Co. v. Olson,* 34 Minn. 450, 26 N. W. 451; *Bennett v. Mass. Mut. Life Ins. Co.* 107 Tenn. 371, 64 S. W. 760. The doctrine of constructive notice is equitable and cannot be invoked for the purpose of allowing a party guilty of fraud to profit thereby;

it will serve equity but not inequity. 21 Am. & Eng. Ency. of Law (2d ed.) 585, 590, 684; *Kilbourn v. Sunderland,* 130 U. S. 518, 519; *Stanley v. M'Gauran,* L. R. 11 Ir. 331, 334, 343; *Converse v. Blumrich,* 14 Mich. 109; *Groton Sav. Bank v. Batty,* 30 N. J. Eq. 131; *Gill v. Hardin,* 48 Ark. 412; *Wild v. Gibson,* 1 House Lords Cas. 623; Kerr, Fraud & M. 80; *Cordova v. Hood,* 17 Wall. 8; *Hopkins v. Langton,* 30 Wis. 379, 381, 382; *Brinkman v. Jones,* 44 Wis. 519; *Dutchess Co. M. Ins. Co. v. Hachfield,* 73 N. Y. 226, 228; 1 Thompson, Commentaries on Negligence, sec. 846. The doctrines of laches, acquiescence and waiver have the same purpose of serving equity as the doctrine of constructive notice, and largely the same elements and scope of application; it is essential to a waiver of a right by plaintiff that there be facts sufficient to create, in favor of the defendant, an equitable estoppel to assert the right. 18 Am. & Eng. Ency. of Law, (2d ed.) 97, 99, 101–103, 111, 115; 28 Am. & Eng. Ency. of Law, 526; *Ripley v. Ætna Ins. Co.* 30 N. Y. 136, 164; *Ross v. Swan,* 7 Lea (Tenn.) 467; *Deihl v. Adams Co. Mut. Ins. Co.* 98 Am. Dec. 307; *Pence v. Langdon,* 99 U. S. 581; *Ellis v. S. W. L. Co.* 102 Wis. 407; *Tarkington v. Purvis,* 128 Ind. 182, 25 N. E. 880; *Bennecke v. Conn. Mut. L. Ins. Co.* 105 U. S. 359. The plaintiff was never insured; the sending to him of a policy he never applied for, and his retention of the same in ignorance of its character, did not operate to make it even a voidable contract,—it was absolutely void. *Strohn v. D. & M. R. Co.* 21 Wis. 561; *Walker v. Ebert,* 29 Wis. 194; *Blaeser v. Milwaukee M. M. Ins. Co.* 37 Wis. 31, 40; *Aultman v. Olson,* 34 Minn. 450; Bishop, Contracts, sec. 646–8, 671. A person cannot raise an equity in his own favor by his own wrong doing. *Guckenheimer v. Angevine,* 81 N. Y. 397; *Neblett v. Macfarland,* 92 U. S. 105; *Dunn v. Amos,* 14 Wis. 115; *Honzik v. Delaglise,* 65 Wis. 500, 501; *Titus v. Glens Falls Ins. Co.* 81 N. Y. 419; *Bidwell v. Astor M. Ins. Co.* 16 N. Y. 266; *Hamlin v. Sears,* 82

N. Y. 331; *Girod v. Michoud,* 4 How. 503, 561; *Conn. Gen. L. Ins. Co. v. Eldredge,* 102 U. S. 245; *Gay v. Havermale,* 27 Wash. 390, 67 Pac. 806; *Hendrickson v. Hendrickson,* 51 Iowa, 68, 50 N. W. 287; *Directors C. R. Co. of V. v. Kisch,* 2 Eng. & Ir. App. 120; *Redgrave v. Hurd,* L. R. 20 Ch. Div. 13.

The following opinion was filed November 11, 1902:

MARSHALL, J. A rehearing having been had in this case, we have examined the questions involved with this result: We are satisfied the law was correctly laid down in the former decision, though it is considered that the same was not in all respects correctly applied to the facts. If we should attempt to write an opinion discussing at length all the propositions advanced in defense of the judgment appealed from, reviewing each of the multitude of authorities cited in support thereof, eliminating in detail those believed not to be in point as to any proposition legitimately in the case, harmonizing those which are correctly decided, and pointing out the errors of expression therein, and such errors and decisions in the others, we are fearful the result would be an opinion of such great length that in so attempting to light a clear way through the mass of things to which our attention has been called, the law, though correctly stated, would not be so clearly declared as to enable trial courts and the profession to easily understand the position of this court by which they are to be guided in future cases involving the same questions. The ground required to be explored to that end, if we were to take the course indicated, would be so extensive that the essential principle finally elucidated would after all be in a measure obscured to one who, from necessity or otherwise, must act from a quick view of things, and the result would be mistakes in the application of the law. Desiring, however, to leave nothing untouched that might in any event give rise to a thought on the part of counsel who with much labor presented the

case for consideration, that material matters have been overlooked, we will endeavor to cover all the important contentions urged upon our notice, supplementing briefly, as seems practicable, what was formerly said on some points, and discussing others so far as seems necessary to show the infirmity of counsel's reasons for a different decision as to the law, and wherein and why we have concluded to apply the same to the facts with a somewhat different result than at first decided upon.

A brief restatement of the facts seems appropriate to the end that the change decided upon from the previous result, may be better understood. We treat the facts as found by the court as verities, and add such undisputed matters on the evidence, not mentioned specifically in the findings, as are of importance.

Appellant's agent induced respondent to sign an application for a $10,000 policy of life insurance by representing to him that it called for one that would be fully paid for in ten annual payments of a specified amount. He signed and parted with such application, relying on the truth of such representations. During the negotiations between respondent and appellant's agent, resulting as stated, the latter urged the former to take out what he called a five per cent. debenture policy, while respondent insisted from first to last that he wanted and would purchase only a contract that would be fully performed on his part by ten annual payments. In due time a policy was sent to respondent by mail, ostensibly responsive to his application, accompanied by a letter from appellant's agent to the effect that it was a five per cent. debenture policy issued pursuant to the application. Respondent put the policy away among his papers without making any examination thereof, relying upon its being what the agent assured him the application called for. He gave cash and notes therefor to the amount of $1,062 for the first premium, which notes he subsequently paid. About four and one-half

months after receiving the policy he examined it for the first time, and then easily and at once discovered that it was an annual payment life policy, requiring him to pay $1,062 each year during his life. He immediately made complaint to appellant's managing agent in respect to the matter, expressing dissatisfaction, and making known that he wanted a different policy, one such as he bargained for. He continued negotiations for several months, endeavoring to have appellant give him what he supposed his application called for, ending with his becoming convinced that no satisfaction would be given him, whereupon, and about eleven months after the policy was received, he wholly rejected it.

One George H. Parker applied to appellant for a $5,000 policy of life insurance under circumstances similar in all respects to those characterizing respondent's application, except the one Parker supposed he was to obtain was a twenty annual payment life contract. In due time a policy was delivered to him by mail, accompanied by a letter, not stating anything to the effect that it was pursuant to or in accordance with his application. He gave cash and notes to the amount of $144 for the first premium, which notes he afterwards paid. He examined the policy for the first time about four months after its receipt, readily and at once discovering that it was an annual payment life policy instead of one such as he supposed his application called for. A few days thereafter he notified appellant's managing agent that he had been deceived into applying for, receiving and keeping a policy different from the one he desired, tendered the policy back, and demanded to be restored to his former position by a refunding to him of all that he had given for the policy except a proportionate amount of the premium to cover the time his life had been insured, which demand was refused.

Arthur H. Barrington, under circumstances similar to those last detailed, applied to appellant for a policy of life insurance, supposing he was to obtain a twenty annual pay-

ment life contract. His application in fact called for an annual payment life contract. In due time he received such a policy, accompanied by a letter not stating anything to the effect that it was in accordance with the application. He gave his note for the first premium, amounting to $195.50, which he afterwards paid. About five months after receiving the policy he examined it for the first time, immediately and readily discovering that it was not what he supposed he was to get. A few days thereafter he notified appellant's managing agent of the facts, tendered back the policy, and demanded to be restored to his former position, which was refused.

There was nothing in either instance misleading the applicant into receiving and retaining his policy as stated, other than what occurred at the time the application was made, except, in respondent's case, the circumstance of the assurance, in the letter accompanying the policy, that it was the one applied for.

Parker and Barrington severally assigned their right against appellant to respondent before this action was commenced. The court held that in each case, by artifice and fraud of appellant's agent, the assured signed his application for a policy, supposing it to call for one different from that actually sent in response thereto; that by reason thereof the applicant was not estopped from rescinding the transaction with appellant if, before the expiration of a reasonable length of time after he obtained actual knowledge of the facts, he made his election in the matter; that he acted in that regard within such reasonable time, and that respondent was therefore entitled to recover as to each of the causes of action sued on.

If this decision depends wholly on whether the applicants for insurance were estopped from rescinding the policies, by signing the applications therefor, they would be entitled to the relief granted by the circuit court. It is elementary that

a person of mature age and sound mind, who, in his dealings with another, deliberately signs a written instrument, is conclusively presumed, as to that other and all persons claiming under him, to know and consent to what the paper contains, no fraud or deceit being used by such other or in his behalf at the time of such signing or efficiently reaching thereto, reasonably calculated to and which does induce such other to become a party to the instrument without reading it, and there being no mutual mistake. It is just as well settled that where there is such fraud or deceit, such person is not guilty of such unreasonable conduct, in relying upon the honesty of such other and signing the paper without reading it or knowing its contents, as to preclude him from obtaining judicial redress in some form for the wrong, if he is injuriously affected by the instrument not being what such other's wrongful conduct induced him to understand was its import, and if he acts in the matter before the intervention of some other element legally efficient to render such wrong without remedy. Of course, mere ignorance by a person of the contents of a paper which he signs cannot avail him to avoid it. True, there are decisions which do not clearly recognize that. Some of them counsel for respondent point to as excusing the applicants here, both in not knowing the contents of their applications and in not knowing the character of the policies received in response thereto till months after their receipt. *Butler v. Regents,* 32 Wis. 124; *Schultz v. C. & N. W. R. Co.* 44 Wis. 638. So far as such authorities are referred to to show that mere ignorance on the part of the applicants for insurance, of the contents of their applications, is sufficient to rebut the legal presumption that such applications were signed and parted with by them with knowledge of the contents thereof, and that the written evidence may be impeached by oral evidence of the actual bargain made at the time the applications were signed, they are not in point, because the court found the element of fraud reasonably calculated to induce the appli-

cants to sign the papers in ignorance of their contents. So far as they are referred to to excuse the applicants on the ground of mere ignorance, for receiving and keeping the policies for months without objection, they have been discredited by more recent decisions of the court. *Prince v. Overholser,* 75 Wis. 646, 44 N. W. 775; *German Bank v. Muth,* 96 Wis. 344, 71 N. W. 361; *Jackowski v. Illinois Steel Co.* 103 Wis. 448, 79 N. W. 757; *Straker v. Phenix Ins. Co.* 101 Wis. 413, 77 N. W. 752; *McGowan v. Supreme Court I. O. F.* 107 Wis. 462, 83 N. W. 775; *Deering v. Hoeft,* 111 Wis. 339, 87 N. W. 298. It follows that no further attention need be paid to the question of whether the applicants were precluded from rescinding their policies upon the ground that they might, had they seen fit to use the means in their hands at the time of such signing, have known the kind of policies they were to receive. The maxim, *"Vigilantibus, et non dormientibus, servat lex"* (the law assists those who watch and not those who sleep), does not apply to a business transaction as between parties thereto where one omits to investigate, relying on assurances by the other as to the facts, made at the time of entering into the transaction, such as signing and parting with a paper by one relying on representations as to its contents by the opposite party thereto. *Schultz v. C. & N. W. R. Co.* 44 Wis. 638; *Brooks v. Matthews,* 78 Ga. 739, 3 S. E. 627; *Wenzel v. Shulz,* 78 Cal. 221, 20 Pac. 404.

Counsel vigorously urges receding from the former decision to the effect that it is negligence for a person to omit to examine his policy of insurance as soon as reasonable opportunity therefor is afforded, relying on assurances made by the company's agent at the time he took the application, as to the kind of policy it called for. We must adhere to our former conclusion on that point, notwithstanding the decisions confidently relied on by counsel to show that it is in conflict with other decisions of this court and authorities elsewhere. We believe the former decision is right on principle, is well sup-

ported by authorities cited in the opinion, and is in strict accordance with the doctrine of the supreme court of the United States on the subject, as we shall show before closing what we have to say. If it were clear that there was any conflict of authority to be dealt with, as claimed by counsel for respondent, since the doctrine involved is within the spirit if not the letter of *Mamlock v. Fairbanks,* 46 Wis. 416, 1 N. W. 167; *Locke v. Williamson,* 40 Wis. 377; *Warner v. Benjamin,* 89 Wis. 290, 62 N. W. 179, and *Farr v. Peterson,* 91 Wis. 182, 64 N. W. 863, and not contrary to any other case in this court when rightly understood, we should not hesitate to be guided, if assistance were necessary, by the decisions of the supreme court of the United States rather than to depart from the settled position here, which has not been disturbed since proclaimed clearly in the *Mamlock Case.* Nearly all the authorities which counsel for respondent rely upon relate to where the complaining party was lulled into security by something said or done by the wrongdoer at the time of the particular transaction complained of. Under those circumstances it is rightly held that such person is not inexcusably negligent. The following are samples of the authorities referred to: *Warder, Bushnell & Glessner Co. v. Whitish,* 77 Wis. 433, 434, 46 N. W. 540, where the rule in *Mamlock v. Fairbanks,* was inferentially affirmed. The injured person, by false representations made at the time, was induced to sign a paper, which was immediately taken away by the wrongdoer. The court said:

"This is not the case of a party, in the absence of fraud or mistake, failing to know the contents of a written instrument signed by himself by reason of his own negligence or want of reasonable care, as . . . *Herbst v. Lowe,* 65 Wis. 316, 26 N. W. 751. . . . Certainly no one will contend that a person can procure the signature of a party to a contract by false representations, and then enforce the contract on the ground that, had the party so deceived been more vigilant, he would have discovered the fraud in time to have withheld his

signature from the contract. In other words, a person cannot procure a contract in his favor by fraud, and then bar a defense to it on the ground that had not the other party been so ignorant or negligent he could not have succeeded in deceiving him."

That clearly shows that the court did not have in mind the action of a person in accepting an article in fulfillment of an order therefor, nothing being then done to prevent or deter such person from seeing obvious departures from the thing bargained for. The distinction between the two classes of cases has not always been carefully pointed out in legal opinions, and not always recognized, leading to expressions therein quite liable to cause one to go astray if he does not keep in mind the philosophy of the rule that *caveat emptor* applies when no deceit is exercised to reasonably excuse a person from dealing at arm's length, and not when there is such deceit; and therefore, while it may not apply to estop a person from successfully complaining of a transaction on account of what occurred at the time of entering into it, it may as to electing whether to abide by the transaction if he is inexcusably negligent in the matter. Those distinctions are accurately pointed out in the reasoning of Judge SANBORN in *New York Life Ins. Co. v. McMaster,* 87 Fed. 63, and *McMaster v. New York Life Ins. Co.* 99 Fed. 856.

Another of the authorities relied on by counsel—one which he insists is directly in conflict with *Mamlock v. Fairbanks* and is supported by the better reasoning—is *Strohn v. D. & M. R. Co.* 21 Wis. 554; citing *Boorman v. Am. Exp. Co.* 21 Wis. 154, and *King v. Woodbridge,* 34 Vt. 565, in both of which it was held that a party is presumed to consent to the conditions of a paper to which he deliberately becomes a party, the idea being that it would be negligence for him not to know its contents; and so such knowledge is conclusively presumed in the absence of some reasonable excuse for his ignorance. So far as the expressions in the *Boorman* and *Strohn Cases*

indicate that mere ignorance is a sufficient excuse for avoiding a paper, they have not been followed in recent years, as we have shown. The real situation in the *Strohn Case* is that property was delivered to the railway company for transportation on the faith of a verbal understanding had at the time of the delivery. The property had been sent forward and was so situated that the transaction could not be varied when the freight receipt, containing the clause complained of, was delivered to the shipper. Speaking to those circumstances the court said the shipper had a right to rely on the verbal understanding, and was not bound, immediately upon receiving the freight receipt, to examine it, and used expressions, it is true, somewhat out of harmony with *Mamlock v. Fairbanks.* The case has never been cited by this court during the thirty-six years since it was decided, to sustain such expressions as good law; while *Mamlock v. Fairbanks* has been followed over and over again, is firmly entrenched in the jurisprudence of the state, and is treated by text writers and courts elsewhere as proclaiming sound doctrine. The *Strohn Case,* with the limitations necessary to harmonize it with current authority, was cited in *Schaller v. C. & N. W. R. Co.* 97 Wis. 31, 71 N. W. 1042, this language being used:

"From the delivery and acceptance of the bill of lading at the time the goods were delivered to defendant for shipment, the presumption arises that plaintiff assented to it. . . . The presumption is not conclusive, but mere ignorance of the contents of the bill of lading, arising from failure to read it or to make some reasonable effort to obtain information in that regard, in the absence of any evidence of fraud on the part of the defendant or of the use of any means to deter the shipper from fully understanding the contract, is not sufficient to overcome it."

Again the court, after saying, in effect, that ignorance is no defense to a contract where the making thereof springs from inexcusable neglect, used this language:

"The familiar rule applies that if a person makes a written contract with another, he takes upon himself the responsibility of acting intelligently, and exercising ordinary care to inform himself of its provisions. Failure to read the contract or to examine it, or, in case of inability to do so without assistance, to obtain such assistance if reasonably within reach, is negligence as a matter of law."

To the same effect are *Herbst v. Lowe,* 65 Wis. 316, 26 N. W. 751; *Fuller v. Madison Mut. Ins. Co.* 36 Wis. 599; *Bonneville v. Western Assurance Co.* 68 Wis. 298, 32 N. W. 34; *Wilcox v. Continental Ins. Co.* 85 Wis. 197, 55 N. W. 188; *Coates & Sons v. Buck,* 93 Wis. 128, 67 N. W. 23. In this class of cases the question involved was, under what circumstances can a person, by oral evidence, impeach a written contract? As shown in the federal cases, the deceit of one person affecting the conduct of another in becoming a party to a written instrument, must refer to the particular instrument in controversy, and to deceit in the transaction leading to the injured party's signing or accepting the instrument. That applies in this case to the signing of the applications for insurance, but not to the acceptance and retention of the policies.

Another of the authorities cited on this branch of the case is *Gunther v. Ullrich,* 82 Wis. 222, 52 N. W. 88, where a person purchased real estate on the faith of false representations, made at the time of the purchase, respecting the location of the property. *West v. Wright,* 98 Ind. 335, is another case. There a person purchased land of another on the faith of false representations made by such other as to the record title to the property.

Strong language was used in deciding the case, condemning the transaction and stating the law along lines many times laid down by this court, but having no reference to such a situation as that here presented, so far as relates to the acceptance and retention of the policies, leaving out of view for

the time being the question of whether anything occurred subsequent to the making of the applications to induce such acceptance and retention, reasonably calculated to deter the applicants from examining the policies. *McKinnon v. Vollmar,* 75 Wis. 82, 43 N. W. 800; *Montreal R. L. Co. v. Mihills,* 80 Wis. 540, 50 N. W. 507; *Porter v. Beattie,* 88 Wis. 22, 59 N. W. 499; *Beetle v. Anderson,* 98 Wis. 5, 73 N. W. 560; *Hart v. Moulton,* 104 Wis. 349, 359, 80 N. W. 599. Counsel quotes, and recited it upon the oral argument with appropriate emphasis, overlooking, as it seems, that it does not apply to the facts of this case,—leaving out of view for the moment, as before said, the question of whether any circumstance occurred at the time of the delivery of the policies reasonably calculated to mislead the persons insured,—this language from *West v. Wright,* 98 Ind. 335.

"I cannot, however, assent to extend the maxim *caveat emptor* so far as to hold that where a vendor of real estate, for the fraudulent purpose of effecting a sale, makes a positive representation of particular facts respecting the title, which he knows or has good reason to believe to be false, and which turn out to be false in fact, but which, if true, would make the title good, he cannot be held liable in an action for fraud, or the vendee can have no right to rescind, because he had it in his power to ascertain from the records the truth or falsehood of the representation and the true state of the title, but has neglected to do so, in reliance upon the truth of the vendor's representation of the facts. There may be good prudential reasons why, when I am selling you a piece of land, or a mortgage, you should not rely upon my statement of the facts of the title, but if I have made that statement for the fraudulent purpose of inducing you to purchase, and you have in good faith made the purchase in reliance upon its truth, instead of making the examination for yourself, it does not lie with me to say to you, 'It is true I lied to you, and for the purpose of defrauding you, but you were guilty of negligence, of want of ordinary care, in believing that I told the truth; and because you trusted to my word, when you ought to have

suspected me of falsehood, I am entitled to the fruits of my falsehood and cunning, and you are without remedy.' "

It will be easily seen that the court held that there was no negligence on the part of the injured person in that case, because he relied upon the positive representations made by the wrongdoer at the time the transaction was entered into. To make that apply to this case we must be able to point to something said or done by the appellant at the time the policies were delivered, reasonably calculated to deter the persons receiving the same from making any examination thereof. *Prince v. Overholser,* 75 Wis. 646, 44 N. W. 775, was referred to. There the rule of *Mamlock v. Fairbanks,* 46 Wis. 416, 1 N. W. 167, was expressly affirmed, the court saying, in effect, that to take the case out of the rule there must be fraud or mistake of such a nature that the defendant could not, with reasonable diligence, acquire knowledge thereof when put upon his inquiry.

We should say in passing that we deem it to be elementary law, as held in *Locke v. Williamson,* 40 Wis. 377, that when a person receives an article pursuant to an order or contract therefor, he is put upon inquiry as to departures therein from the thing bargained for, which are open to ordinary observation, nothing occurring then to induce him to accept the article as satisfying the order or contract without examining it. Such is the rule laid down in the federal court in the *McMaster Cases* in all stages of the litigation over the six policies involved in the transaction, with which the court had to deal. In all stages of the litigation up to and inclusive of the final disposition thereof by the supreme court of the United States, as we shall see hereafter, the rule we have stated was clearly recognized and applied. We might go on through substantially all the great array of cases cited by counsel to show that deceit practiced by the appellant's agent in obtaining the applications for insurance excused the applicants from making any examination of their policies when re-

ceived, with the same result as with those to which we have referred. To do so would draw this opinion out to a very great length, which is what we desire to avoid. We will suspend on the question here discussed, believing that the law is fully established and that we have clearly demonstrated it, that a person is negligent in receiving an article and accepting it without any examination thereof, wholly relying on representations, whether fraudulent or not, made at or previous to the time when the article was contracted for or ordered. In this it should be understood that the mere reception of the article does not imply acceptance thereof till the expiration of reasonable time for examination. That is the rule of *Locke v. Williamson.*

It is earnestly contended by counsel for respondent that the former decision, holding that negligence on the part of the insured persons, in receiving and retaining the policies for a long time without objection, stands effectively in the way of respondent's recovery, is wrong on principle: (1) Because negligence does not preclude relief by a person damaged by intentional wrongdoing; (2) Negligence of one does not accrue to the benefit of another to whom he owes no duty; (3) The court's decision is out of harmony with the doctrine that a person cannot profit by his own wrong; (4) Nothing short of actual knowledge prevents relief till the right involved is extinguished by the statute of limitations,—that reasonable means of knowledge, and negligence in not profiting by it, from which knowledge in fact is presumed, is not sufficient. We will briefly answer each of the propositions, though in doing so we must repeat, somewhat, what was formerly said.

1. The conclusive answer to the first proposition is that it does not necessarily apply here, leaving out of view the question of whether anything occurred inducing belief as to the character of the policies at the time they were received, because it relates only to when there is a concurrence of inten-

tional wrongdoing and negligence producing the injury, not where inexcusable inadvertence actually intervenes between the wrong and the injury complained of, so as to stand as the real producing cause of such injury.

2, 3. The second proposition does not fit this case, because the inexcusable negligence of a person, in entering into or abiding by a business transaction with another guilty of deception, influencing such person's conduct in the matter, is not held to be a direct defense to such person's claim for redress, but to be evidence of acquiescence with knowledge of the facts, or in connection with injury to such other by delay in such person's asserting his right to relief, if such assertion were successful, or in connection with some other efficient circumstance, to estop such person from doing anything inconsistent therewith. Even a wrongdoer has rights which the law respects. A person injuriously affected by the wrong of another in a business transaction may himself be guilty of wrong in asserting his right to redress, so affecting the latter as to give him the right to use the doctrine of estoppel for his protection against the former's claim. A third answer is this: Inexcusable negligence of a person in his business transactions with another is not, as said in the former opinion, held to be a defense to the former's claim for redress out of any favor found in the law for the latter, or defense, strictly so called, to such claim at all, in any other sense than that the law affords no redress under the circumstances, its policy being only to aid those who use some reasonable degree of care to guard their own interests. All of such reasons, we apprehend, will readily be recognized as elementary law.

Answering more particularly counsel's first proposition, a contract entered into by fraud on one side, or mistake through negligence on the other, is not absolutely void. While in one sense it is not the contract of the latter at all, because of his nonassent to its terms with knowledge of the facts, he may add the element of assent at any time, actually or con-

structively. Such a transaction is not then, in a legal sense, absolutely void; it is only voidable. *Weed v. Page,* 7 Wis. 503, 512; *Potter v. Taggart,* 54 Wis. 395, 400, 11 N. W. 678. When the essential element of assent is added, it gives effect to the transaction as a binding contract from the beginning, the same as if no deception had been practiced. The evidence of such assent may rest solely in inexcusable neglect of the injured person to do anything inconsistent with the validity of the contract. Then if such person fails to recover, such other does not, in the sense of the salutary doctrine which counsel invokes, profit by his own wrong, but by such person's submission to the wrong. Or, if the other element be added, of misleading the wrongdoer himself in the meantime, the recovery is defeated by such person's own wrong, misleading the first wrongdoer to his prejudice, upon principles of estoppel. Speaking of contracts voidable for fraud, it is said in Wald, Pol. Cont. p. 539:

"Omission to repudiate within a reasonable time is evidence, and may be conclusive evidence of an election to affirm the contract; and this," says the writer, "is in truth the only effect of lapse of time," by itself.

Again the writer says (page 541):

"The party who made the misrepresentation in the first instance may have acted on the faith of the contract being valid in such a manner that a subsequent rescission would work irreparable injury to him."

Keeping in mind that rescission, whether the object of a suit in equity or forming the basis of a rescission at law, is governed by equitable principles (*Gates v. Raymond,* 106 Wis. 657, 82 N. W. 530; *Gay v. D. M. Osborne & Co.* 102 Wis. 641, 78 N. W. 1079; *Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571), the application of this language from the opinion of Sir BARNES PEACOCK, in *Lindsay Petroleum Co. v. Hurd,* L. R. 5 P. C. 221, 239, to the facts before us is not difficult to see:

"Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. . . . Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

In *Clough v. L. & N. W. R. Co.* L. R. 7 Exch. 26, 35, MELLOR, J., said, in effect, that if a person is induced to enter into a contract by fraud, he has his election to avoid it till he elects to affirm it, and that lapse of time alone may constitute conclusive evidence of such election, with this exception, however:

"If the rights of innocent third persons intervene in the meantime, or if in consequence of the delay the position of the wrongdoer is affected, it will preclude him (the injured party) from exercising his right of rescission."

See also to the same effect, *Oakes v. Turquand,* L. R. 2 H. L. 325; *Houldsworth v. City of Glasgow Bank,* 5 App. Cas. 317; Kerr, Fraud & Mistake (3d ed. Williams), 10.

Those principles apply with great force to this class of cases. The respondent had the full benefit of his insurance for nearly a year before he repudiated the transaction, and his assignees had the benefit of theirs for months before they acted in that regard. The entire period covered by the first premium upon respondent's policy had, before he refused to abide by such policy, nearly expired. No one would venture to claim that if he had died during such period of delay the company would not have been bound by the policy and his personal representatives would not have enforced it. During all that time the money paid by respondent for his policy

formed a part of the fund relied upon by the other policy holders for their protection, part of the assets of the company upon which all its operations were based. It was not guilty of any moral turpitude except by imputation. Its officers were not guilty of any wrongdoing whatever. They supposed, and had a right to suppose, for months, that the company's soliciting agent acted honestly in obtaining the applications for the policies. They knew that the policies issued, received and retained were in strict accordance with the applications. They carried the risk assumed on their books as part of their liabilities, and the premiums paid, as before indicated, as part of their assets. All the policy holders of the company were interested in the fund of which the money sought to be recovered formed a part, and many of them, we may rightly assume, joined the company during the period of delay.

Speaking more particularly in regard to the third reason we have given for condemning counsel's second proposition, that the rule declared in the former opinion, that negligence may prevent a recovery in a case like this, is wrong on principle,—the rule following the maxim, The law assists the vigilant, not the careless, "*Vigilantibus, et non dormientibus succurant jura,*" is grounded on that wise policy in the law which at every turn of life casts upon all persons in severalty, who are of sound mind and mature years, the personal duty to exercise some reasonable degree of care for their own protection, enforcing it, in some cases, solely by refusing to open the doors of judicial tribunals to those who deal heedless of their interests, depending upon the courts to protect them from injurious results, as that policy which in the end best protects individual members of society and at the same time guards against those responsibilities that can be better borne in an individual way, being unnecessarily or unreasonably, to any extent, cast upon the public at large. In that, as can readily be seen, the courts, while not excusing at all the

iniquity of the wrongdoer, regarding the interests of society as a whole as well as individual rights, place a reasonable limit upon the use of those instruments provided for administering justice between man and man. Litigants do not bear the burden of administering justice except in a very small degree. It is borne in the greater part by the public at large. Proper appreciation of that will enable one to easily and clearly see the wisdom of that policy which extends the benefit of courts of law in business matters, only to those who use common prudence to guard their own interests. One may consent, either actually or constructively, to be imposed upon, if he sees fit, in a business transaction, and the courts will not interfere. It is unfortunate that courts have sometimes been so swayed by apparent hardship in applying the rules we have stated to particular cases, as to use language in opinions leading to false notions both as to the reason of the law and its application,—language quite liable to mislead unless one is firmly grounded in the philosophy of the law so as not to be unduly disturbed by the rhetorical flights sometimes indulged in by judges, seemingly losing sight, for the moment, of a safe landing place. Evidence of such mental excursions is not hard to find in some of the quotations called to our attention by the learned counsel for respondent, which have, perhaps not unreasonably, produced conviction in counsel's mind that the judgment appealed from is wholly right. The correct idea is expressed by a leading case in the supreme court of the United States, often cited and followed by this court, and cited by the learned counsel for respondent, substantially thus: Want of proper care on the part of the vendee of an article to protect himself from imposition takes from him all just claims for relief, whether his negligence is attributable to his indolence or credulity. *Slaughter v. Gerson,* 13 Wall. 379. Clearly, the court used the term "just claim" solely as regards the right of the purchaser to invoke judicial power to save himself from loss, not with the idea

that the moral wrong done by the vendor could be balanced by his victim's negligence. Obviously, there are many such wrongs for which the machinery of courts does not furnish a remedy. Perhaps the reason for the rule is as clearly stated in the early case of *Moore v. Turbeville,* 2 Bibb, 602, often cited by courts and text writers, as anywhere:

"There are many instances in which a person may be guilty of a moral delinquency, without incurring a legal responsibility; for legal obligations are necessarily more circumscribed in their nature than moral duties. *Fides servanda* is indeed a rule of law, as well as of morality, and will be rigorously enforced in favor of one who is chargeable with no culpable negligence or inattention to his own interest. But to one so chargeable, the law will not afford relief. . . . The law does not deny its aid in such case, because it looks upon a want of candor and sincerity with indulgence, but because it will not encourage that indolence and inattention, which are no less pernicious to the interest of society. A diligent attention to our own concerns as well as good faith to others, is a virtue; and the law, while it recognizes the rules which tend to preserve the latter, at the same time is careful to guard the principles which prompt to the exercise of the former. With respect to points plainly within the reach of every man's observation and judgment, and where an ordinary attention would be sufficient to guard against imposition, the want of such attention is, to say the least, an inexcusable negligence. To one thus supinely inattentive to his own concerns, and improvidently and credulously confiding in the naked and interested assertions of another, the maxim, '*Vigilantibus et non dormientibus jura subveniunt,*' emphatically applies, and opposes an insuperable objection to his obtaining the aid of the law."

The supreme court of Ohio, in *Ætna Ins. Co. v. Reed,* 33 Ohio St. 283, speaking on the same subject and citing in support a multitude of authorities, said that in matters of contract, if one negligently omits to guard his own interests, the law will not lend its help to aid him. Pages could be covered in citations to the same effect.

4. Counsel for respondent further attacks the former decision, standing firmly on the theory which the circuit court supposed ruled the case, that, conceding negligence may affect the right to recover in a case like this, it does not so operate in the absence of actual notice of the fraud; that if the wronged party is not thereafter negligent in electing what course he will pursue and informing the wrongdoer thereof, the remedy for rescission in equity or for damages at law based on a previous rescission by the act of the party, will remain open to such party. It will be observed that the trial court did not deal at all, in the findings, with whether the policy holders were negligent in discovering the facts respecting the fraud. Counsel's contention was evidently adopted, that mere constructive notice, evidenced by negligence in not profiting by reasonable opportunity to discover the fraud, only sets running the statute of limitations. We confess there is some judicial support for that, contrary, however, to the great weight of authority, and to *Mamlock v. Fairbanks,* 46 Wis. 416, 1 N. W. 167, and authorities affirming that case in this court, as respondent's counsel seem to appreciate. An earnest appeal to disregard the *Mamlock Case* is made, though it is nowhere pointed out that it has been directly discredited by this or any other court or text writer, and it is not and cannot be denied that it has been here many times affirmed in spirit if not in letter. We have not been able to discover in any of the authorities brought to our attention a satisfactory reason for departing from the established judicial policy of the state indicated in that case. No case in this court has, in the decision thereof, directly or indirectly favored the doctrine that the right to rescind a contract for fraud continues during the running of the statute of limitations regardless of constructive notice of the facts. Means of knowledge of the fraud, said the court in the *Mamlock Case,* is always a material question in determining the right of rescission, and that is within the principle of *caveat*

emptor, citing as a "principle so universally recognized by the authorities that it needs no further reference," Kerr, Fraud & Mistake, 101, to the effect that he who has under all the circumstances reasonable opportunity to discover the deceit, is chargeable with knowledge thereof to the same effect as if he possessed actual knowledge of the subject. That doctrine is laid down in 2 Parsons, Cont. pp. 781, 782, in these words:

"If he rescinds on the ground of fraud, he must do it at once on discovering the fraud."

"Any delay, especially if it be injurious to the other party, would be regarded as a waiver of his right."

"The mere lapse of time, if it be considerable, goes far to establish a waiver of this right; and if it be connected with an obvious ability on the part of the defrauded person to discover the fraud at a much earlier period, by the exercise of ordinary care and diligence, it would be almost conclusive."

In *Erlanger v. New Sombrero Phosphate Co.* 3 App. Cas. 1283, the language heretofore quoted from the judgment of the privy council in *Lindsay Petroleum Co. v. Hurd,* L. R. 5 P. C. 221, was cited with approval, with remarks by Lord BLACKBURN, recognizing that the deceived party may forfeit his right to rescind by failing to make his claim in that regard with reasonable promptness after "he knows or may with reasonable diligence know that he has been defrauded." Moncreiff, Fraud & Misrep. 282.

McCarty v. New York Life Ins. Co. 74 Minn. 530, 77 N. W. 426, is cited by counsel as in direct conflict with *Mamlock v. Fairbanks.* The court there treated the subject of negligence as evidence of waiver, and negligence as a defense, but not as involving the right to judicial remedies as affected by public policy. A clear distinction was pointed out between negligence of a person in not protecting himself from fraud perpetrated by another at the time of signing and delivering to such other an application for an insurance policy, and negligence in failing to discover obvious departures from the

application when the policy is received, nothing occurring at the time to lull such person into security on the subject. The language used by the learned judge as to the last situation mentioned, wherein some discrimination is made between the rights of a person injured by the fraud of another, as against such other and as against third persons, leaving out of view the doctrine of estoppel, overlooked as it seems some elementary principles which we have mentioned, and is in direct conflict with the federal cases to which we have referred and will hereafter more particularly refer. It is significant that the subject was treated very briefly, no authorities being cited to support what was said. However, where the court, earlier in the case, discussed and disposed of the question of whether constructive notice of the fraud sets running the time within which the wronged party can rescind, constructive notice was recognized as effective as well as actual notice, and it was inferentially held that a statement of the rule not so recognizing the law to be is inaccurate. Here is the language used:

"The rule, as generally laid down in the books, is that the right of rescission accrues only after discovery of the fraud, and that delay is not imputable against the party defrauded, until he makes that discovery. But, we have no doubt that there may be cases where the party is so grossly negligent in failing to use means of knowledge within his possession, which he was bound to avail himself of, that delay would be imputable to him, even before he actually discovered the fraud. Hence perhaps a more accurate statement of the rule is that delay is not imputable to the party defrauded until he has sufficient knowledge of the fraud to make the delay material, or such means of knowledge as he was bound to avail himself of."

Leake, Cont. 324, and *Browne v. McClintock*, L. R. 6 H. L. 456, were referred to, which amply support what was said. That which the learned judge said was perhaps the way to accurately state the rule was thus recognized by Mr. Justice

FIELD to be the law, in *Slaughter v. Gerson,* 13 Wall. 383, to which we have before referred:

"A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before him, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statement of another."

The exception mentioned,—which is found in all careful statements of the law in these words: "where no concealment is made or attempted"—we have heretofore shown, refers to concealment made or attempted by some act of the wrongdoer at the time, or efficiently reaching to the occasion, when the wronged party should exercise his senses, reasonably, to protect his own interests. It will be seen that the law was so distinctly applied in the *McMaster Cases* to which we shall presently refer. We might go on reenforcing the *Mamlock Case* by a large number of citations, though we confess that the inaccurate statement of the rule under discussion, recognized by Judge MITCHELL, as before indicated, can be found many times in legal opinions where constructive knowledge was not material, and in some instances, probably, it formed the basis for erroneous decisions, and for misleading judicial declarations in others, some of which are found quoted in the brief of counsel for respondent and were referred to by him with great emphasis upon the oral argument. It would seem that the confession by so learned a judicial writer as Judge MITCHELL, that the statement of the law as to when time for the rescission of a contract for fraud com-

mences to run, as in the *Mamlock Case,* is probably the strictly accurate way to put the matter, and the other authorities to which we have referred, render any further vindication of such case unnecessary. If, however, it needs further support, that will be found in our treatment of the next reason urged by counsel for respondent why our former decision is wrong.

Leaving out of view what we formerly regarded as controlling decisions of this court, the *McMaster Cases* in the federal court were cited as worthy of the highest regard in reaching a correct conclusion. It is now contended by respondent's counsel, as we understand his argument, that admitting the effect of the decisions in the court of appeals, those cases (87 Fed. 63, and 99 Fed. 856), if in any event they could be considered as voicing the doctrine of the federal courts, are of no force because the last decision was reversed by the supreme court of the United States, it being held, "in substance, that knowledge of the contents of the policies was not 'legally imputable' to McMaster because of his failure to read them." "But," says the learned counsel, "it is not necessary to multiply citations to show the *error of the assumption* that the doctrine of constructive notice *can be made available as a cover for fraud.*" In that is a most striking indication of the misapprehension in the mind of counsel of what we aimed to say, and in our view plainly said in the former opinion, and a strikingly illegitimate characterization of the solemn decision of this court, which was based on what counsel admits to be the established doctrine if *Mamlock v. Fairbanks,* 46 Wis. 416, 1 N. W. 167, is to stand as the settled law. Constructive notice was not formerly held to be under any circumstances a "cover for fraud." It was held to be evidence of assent, regardless of the fraud, or, if not such, of inexcusable negligence, waiving judicial remedies for fraud; and not upon mere assumption, but upon the authority of this court in previous decisions, and of most other courts.

Here we may, as it seems, properly and benefically digress to make some observations on aspects of the argument for and on rehearing. It is hardly legitimate, in endeavoring to persuade the court to recede from a decision, admittedly right if a previous decision of the court of long standing is to be followed, to refer to the later decision as based on error of assumption, and to speak, as was done in the motion for reargument, of the former decision as if it were a personal affair, and of decisions in this and other courts, and the reasoning therein found, as mere "wind of doctrine." It is not understood here that the former opinion was based on assumption, or upon anything but judicial authority, largely drawn from our own judicial history. It was a careful, considerate decision of the court, voiced by the writer, as its instrument, to whose lot it happened to fall to perform that duty, and who performed it, keeping strictly within the lines decided upon. Courts are not infallible in fact, and never will be so long as the law must be administered by human agencies; but their judgments, based on judicial authority, are not properly referred to as based on "error of assumption," or mere "wind of doctrine." Nor are they the work of any particular member of the court,—not of the one upon whom may devolve, under the court rules, the duty of giving voice to the grounds for it in the opinion, any more than the others. The idea sometimes in the mind of counsel in viewing a decision, that it is something other than that of the court, is erroneous, and is liable to stimulate inconsiderate action on the part of counsel, both in language and procedure. It gives to counsel the appearance of not appreciating the responsibility resting here to decide controversies as to the best of our ability it is given us to decide, regardless of the effects and consequences upon parties or counsel in the particular litigation, necessary to enable them to view with complacence the final result, whatever it may be. In connection with these remarks, to the end that the beneficial purpose intended may not be miscon-

ceived, we wish to record the fact that we greatly appreciate the earnest, faithful devotion of the eminent counsel for respondent in this case to the interests he stood for in court, and entertain a high regard for his ability, industry and courage, which is manifest on his every appearance here, and for the aid which his labor has given us in arriving at a correct conclusion now.

Returning to the *McMaster Cases,* we will say, and endeavor to demonstrate, that counsel is in error in his view that the supreme court, in reversing the decision of the court of appeals, 99 Fed. 856, held that possession of a policy of insurance does not impute knowledge of its contents, in the absence of any deception practiced upon the possessor subsequent to his making the application therefor, reasonably calculated to deter him from examining such policy at the time of its receipt. The court, as it seems to us, held directly to the contrary. We can best demonstrate the correctness of that view by giving a full history of the *McMaster* litigation as found in the federal reports. Here is the history: Fred A. McMaster signed applications for six policies of life insurance in the New York Life Insurance Company, delivering them to such company's agent. After the applications were signed the agent, without the applicant's knowledge or consent, wrote into them these words: "Please date the policies same as applications," in order to further his own interests by obtaining credit for the work in the year in which such applications were made, helping to make up the necessary amount of insurance taken by him during such year to entitle him to a greater percentage upon the business of such year, as his compensation for service than he would otherwise obtain. The policies were issued, dated as directed, making the annual premium payment December 12 in each year, when it otherwise would have been made December 18 in each year. As the applications were when signed, the first payment would have covered thirteen months from the time

the first premium was paid, which was December 26, 1893. By the unauthorized act of the agent, the life of the policies was cut down so they had but twelve months and seventeen days, after the actual delivery thereof, to run. McMaster failed to pay the premiums on his policies when due by their terms, December 12, 1894. He died December 18th, the day he supposed the payments were due. An action was brought by his administrator to reform the policies, advancing the due date of the annual premium from December 12th to December 18th of each year, in accordance with the applications as they were when signed. There was evidence that the policies were delivered ostensibly responsive to the applications, no evidence being produced of any communication at the time of such delivery to McMaster to deter him from examining the same. There was evidence to the effect that the agent represented, when the applications were made, that the first payment of premium would cover a period of thirteen months. McMaster made no complaint at any time that the policies were not as agreed upon. He did not read them or know that they were not so drawn as to make the first payment carry the policies till December 18th the next year. The company's collector called on him December 11th or 12th before he died, to whom he said he did not intend to keep up the policies, but made no complaint whatever. The court held, on those facts, that if fraud was committed on McMaster, his keeping the policies as he did, without objecting when he had ample opportunity to know their contents and to reject them if he did not want them, since he was not deterred from doing so by anything said or done by the company after the applications were signed, was in law a waiver of the fraud, precluding any judicial relief therefor. The court said:

"He could not have been deceived as to the terms or legal effect of these contracts, if he read them. It was his duty to read and know the contents of the policies when he accepted them. It is true that the evidence is that he did not read them, but the legal effect of his acceptance is the same as if

he had read them. He had the opportunity to read and to learn their contents, and, if he did not, it was his own gross negligence, and no act of the insurance company or its agent that concealed them and misled him as to their effect."

Taking up the question of whether the statement made by the agent when the applications were made, to the effect that the first payment would cover thirteen months, was sufficient to take the case out of the rule requiring a person, upon receiving an article ostensibly upon fulfillment of an order or contract, to see obvious departures therein from the thing bargained for, the court held that nothing short of something said or done at the time of the delivery of the article, the applicant therefor then having ample opportunity to examine it as to defects therein, open to ordinary observation, throwing him off his guard and reasonably excusing him from making such examination, will excuse him from improving the opportunity for such examination; and if he does not intend to assent to keep the contract in satisfaction of his order, within a reasonable time thereafter, from notifying the party from whom he received such article that it will not be so accepted. This language on the subject was used, in addition to that just quoted:

"The statement of the agent fourteen days before the deceased received the policies that they would insure him for thirteen months from the payment of the first premiums was not a statement of an existing fact. It was not calculated to impose upon him, or to prevent him from reading his policies and learning for himself whether this promise had been kept or broken."

To the quoted language in the whole the court cited many authorities, including cases decided by this court. The conclusion reached was that neither a court of law nor of equity could afford the McMaster estate relief. The decision was inferentially approved by the federal supreme court by its judgment refusing to issue a writ of *certiorari* to review it. 171 U. S. 687, 18 Sup. Ct. 944. Later, McMaster's adminis-

trator commenced an action to recover upon the policies in the circuit court for the Northern district of Iowa, and was defeated. The case was carried to the circuit court of appeals for review, where the judgment was affirmed, the court following the decision in 87 Fed. 63, the evidence being substantially the same in both cases, except in the latter it was made to appear that the agent personally delivered the policies to McMaster, stating then, in response to the latter's inquiry as to whether they were as promised and would insure him for thirteen months for the first premium, that they were and would; and the premiums were paid upon such assurance being given. The court held that such circumstances, as a matter of law, were not sufficient to excuse McMaster for not knowing the terms of his policies and seasonably objecting to them if he did not care to accept them as satisfying what he bargained for. The judgment was carried for review to the supreme court, and was there reversed solely on the ground that the assurance to McMaster at the time of the delivery of the policies, rendered the question of whether his keeping them as he did, without objection, constituted an acceptance thereof as satisfying what was bargained for, one of fact for the jury. The general principles upon which the case was decided by the trial and appellate courts were fully approved, but it was held that the false representations made at the time of the delivery of the policies had sufficient tendency to throw McMaster off his guard,—to lull him into security as to their being what he expected,—to prevent the court from holding as matter of law that he was inexcusably negligent, precluding him from successfully invoking the aid of the court to redress the wrong committed by the company's agent in its name. Speaking of the changed situation produced by giving proper significance to the circumstance mentioned, this language was used:

"We are unable to concur in the view that McMaster's omission to read the policies when delivered to him and pay-

ment of the premiums made constituted such negligence as to estop plaintiff from denying that McMaster by accepting the policies agreed that the insurance might be forfeited within thirteen months from December 12, 1893." *McMaster v. New York Life Ins. Co.* 183 U. S. 25, 22 Sup. Ct. 10.

There is the rule clearly recognized that when a person receives a policy of insurance in response to an application therefor, or as the result of a written application, or a written application and verbal communications between him and the agent of the company issuing the policy, unless some misrepresentation or fraud is practiced upon him at the time of the delivery of the policy, furnishing some reasonable excuse for his not reading and knowing its provisions so far as they would, by such reading, be readily understood, it is such negligence not to so read and know, that if he neglects to object to the policy within a reasonable time after receiving the same, the delay will estop him from obtaining judicial aid to remedy any injury he may suffer from the policy not being as agreed upon. That, as we have seen, is not because of any breach of duty on his part to the wrongdoer, but because of breach of duty to himself, or his assent to the contract. The idea of counsel for respondent that there can be no negligence in circumstances such as we have discussed which can help the wrongdoer because the injured party owes the wrongdoer no duty, grows out of failure to appreciate that negligence in a case like this does not, except when coupled with circumstances effecting an estoppel, presuppose duty of the injured person to the wrongdoer, but, as we have indicated, duty of such person to himself.

All the reasons advanced for a different decision than that formerly announced as to the law of this case, which seem worthy of attention, have now been discussed. There remains to be considered the subject of whether we before correctly applied the law to the facts. At the threshold of that inquiry we meet the point made by appellant's counsel—not considered on the former occasion because unnecessary in view of

other questions decided—that there is no evidence that *Bostwick* placed himself in a position, before this action was commenced, to give him a complete cause of action. That is, that he had not, before his suit was comenced, rescinded his policy. There is no controversy but that, promptly after he actually discovered the facts, he complained of the fraud established in the case and made known to appellant his election to disaffirm the policy. It does not appear that then, or at any subsequent time, he formally offered to return his policy, or that he made, before suit brought, a formal tender thereof to appellant. It is undisputed, however, that he insisted upon having his money back or a new policy; that he would not abide by the transaction as it stood; and that appellant positively refused to make any change in the matter, and denied his right to rescind. Such denial was, in effect, found by the trial court and not excepted to. There is a finding that respondent offered to return his policy, which finding is excepted to. It is considered that the repeated demands by respondent for a return of his policy or for a new one in accordance with his understanding of the application, carried with them, inferentially, a sufficient offer to surrender the policy to effect a complete rescission thereof, before suit was commenced, in view of appellant's unqualified denial of respondent's right. This court has several times so held under similar circumstances. *Potter v. Taggart,* 54 Wis. 395, 11 N. W. 678; *Herman v. Gray,* 79 Wis. 182, 48 N. W. 113.

True, a cause of action at law to recover the consideration paid upon a contract void for fraud is not complete so that a suit may be maintained to enforce it until the transaction has been fully repudiated, the complaining party having done all that in justice he ought to do, measured by settled laws on the subject, to restore the wrongdoer to his former position. The idea is that the existence of the cause of action itself depends upon the contract, binding till avoided, having been in fact avoided. Hence, in such a case as this the plaint-

iff must fail unless he is able to show that before he commenced the same the contract relations between him and the defendant which were fatally tainted with fraud, had been wholly severed so far as was reasonably within his power to accomplish it. We must not overlook the distinction between an action at law based on rescission for fraud,—an action where rescission necessarily precedes the existence of the cause of action,—and an action in equity for rescission. In the former case rescission is effected by the act of the party injured. In the latter he seeks the aid of a court of equity to effect rescission. In the one case there must be an election to rescind, fully acted upon. That requires the complainant, before commencing suit, to return or offer to return that which he received, or willingness and ability to return the same, and such conduct on the part of the wrongdoer as to show that a formal offer or tender would have been wholly useless. In the other case there must be at least willingness and ability to restore the wrongdoer to his former position so far as justice requires, as a condition of the contract being set aside by the judgment of the court. These distinctions, which have been recently carefully elucidated by this court (*Ludington v. Patton,* 111 Wis. 208, 86 N. W. 571), need to be kept in mind. They have not always been, as indicated by the cases cited. We need not go further than *Potter v. Taggart, supra,* to discover, in an action at law based on rescission, language wholly appropriate to an action in equity for rescission. In stating the conditions precedent to the bringing of the suit, it was said that the action was for rescission, and the rule in relation to the necessary conduct of the complainant to maintain such an action was somewhat confused with that requisite to an action in equity. That was intensified in *Herman v. Gray, supra.* However, those cases may be considered as holding, and have generally, we think, been so considered, that there must be at least an unconditional offer to restore the wrongdoer to his former position before

suit brought, or the equivalent, such as a complete repudiation of the fraudulent transaction, notice thereof to the wrongdoer, unconditional denial of the right of rescission on the latter's part, his attitude being such as to render a formal offer to return to him what he parted with useless, and a willingness and ability to make such return so far as justice requires, at the time of the trial, enabling the court then to give back to him what the complainant could not because it would not be received. The facts of this case fully meet those requirements, so we hold that they effected a complete avoidance of the policy by respondent before the action was commenced. His insistence, from the time he discovered the fraud down to the time of the commencement of the suit, upon a return of his money or possession of such a policy as he bargained for, and the unqualified refusal of the appellant to do either one thing or the other, rendered a formal offer on the former's part, to tender back his policy, a useless proceeding.

Some other points are made by appellant, which are rendered immaterial by the conclusion we have reached.

Now in applying the law to the facts, in view of what has been said each of the policy holders must be considered as having had knowledge of the fraud from the time when, by the exercise of ordinary care, he might have had it. That time, as to Parker and Barrington, was substantially when they received their policies. As to each of them, as we have seen, there was no statement made, or circumstance which occurred after the making of the applications, reasonably excusing him for not examining his policy when it was received. Since, as to each of them, when he did make such examination, he easily and at once discovered the fraud that had been perpetrated upon him, we must assume that he ought to have had knowledge thereof very soon after his policy came to his hands. We have no finding by the trial court as to electing to rescind the policies within a reasonable

time, except upon the theory that constructive knowledge of the fraud did not start the time therefor running. That left several months' time out of view. We adhere to our former decision that upon the evidence Parker and Barrington are chargeable as a matter of law with knowledge of the fraud from the time they received their policies; that, as a matter of law, they waited thereafter an unreasonable length of time before electing to rescind the same. Therefore, as to the assigned claims, there can be no recovery.

As to the *Bostwick* policy it is considered that the assurance contained in the letter accompanying it when it came into respondent's hands, in effect that it was in accordance with the understanding which he supposed and had a right to suppose was written into the application, was reasonably calculated to lull him into security on the subject and cause him to lay the policy aside without examining it. It is useless here to discuss at length the particular wording of the letter containing such assurance. We have weighed it in every reasonable aspect in which it can, in our judgment, be viewed, resulting in a conclusion—not without some misgivings, we confess, on the part of some of the members of the court as to its correctness—that it was not as a matter of law entirely unreasonable for *Bostwick,* relying upon the letter which presumably he read, to lay the policy aside without reading it. True, the letter characterized the policy as a five per cent. debenture contract, and *Bostwick* testified that such a policy of a particular character was urged upon him by the agent at the time the application was taken, and that he then insisted that he would not take anything but a ten annual payment life policy, indicating, in one view, that the two policies were at the time of the application considered as entirely different. But it is also true, as we understand it, that a five per cent. debenture policy might well be written on a ten annual payment plan. Therefore, the assurance contained in the letter, that the policy was in accordance with the application,

might reasonably be said to convey the idea that it was a ten annual payment life contract with the five per cent. debenture feature which the agent so strongly recommended. In that view it is considered, not without some hesitation, we must say, that the circumstances characterizing the delivery of the policy are substantially the same as those in the last *McMaster Case*, which were deemed of sufficient significance to stand effectively in the way of a conclusion that, as a matter of law, McMaster knew the contents of his policies from the time he received them. Guided by that decision we are constrained to hold that the assurance to *Bostwick* may be reasonably said to satisfy the principle, said in the *Mamlock Case* to be concomitant and necessary to be considered with the maxim, "*Vigilantibus et non dormientibus jura subveniunt,*" and the rule of law based thereon, "that the seller must not use any art or practice any artifice, to conceal defects, or make any representations, or do any act, to throw the purchaser off his guard, or to divert his eye, or to obscure his observation, or to prevent his use of any present means of information." In that light we must hold that it does not appear as a matter of law that *Bostwick* was chargeable with knowledge of the fraud found to have been practiced upon him till he obtained actual knowledge thereof. That leaves the question of whether he ought to have read his policy when he received it notwithstanding the assurance accompanying it, one of fact not covered by the findings. It must be solved before a complete disposition of this case can be made. In the *McMaster Case,* it will be remembered, the farthest the court went was to hold that the question of whether the assurance given McMaster when his policy was delivered, was sufficient to render the question of whether he was inexcusably negligent, testing his conduct by what persons of ordinary care would generally do under the same or similar circumstances, in laying his policy away and not examining it, a jury question. The case was tried by a jury.

Here the case was so triable, but was by consent tried by the court. In that situation this court does not direct the judgment to be rendered if the unsolved issues of fact might go either way and it is doubtful which is proper, so that in attempting to decide them originally here injustice might be done. *Brown v. Griswold,* 109 Wis. 275, 85 N. W. 363. If the time within which respondent was bound to make his election to rescind the policy commenced to run from the time when he obtained actual knowledge of the fraud, the circumstances being such as not to charge him with constructive knowledge, then there should be a recovery as to his policy, as decided by the trial court. But if, on the other hand, it shall be found as a fact that, notwithstanding the language of the letter accompanying his policy, and all the evidence bearing on the question, he was inexcusably negligent in not looking at the paper when he received it or soon thereafter, and observing the evident departures therein from the one he intended to apply for, he is not entitled to recover.

By the Court.—The judgment of the circuit court is reversed and the cause remanded with directions to decide the question of fact suggested as being yet unsolved, and to then render judgment in accordance with this opinion.

CASSODAY, C. J. I concur in the result of the decision in this case, except as to the *Bostwick* policy; and as to that I think the judgment should be affirmed. As to that policy, the evidence, in my judgment, clearly brings the case within the well-established rule stated in a recent standard work, cited by plaintiff's counsel, as follows:

"By the overwhelming weight of authority, ordinary prudence and diligence do not require a person to test the truth of representations made to him by another as of his own knowledge, and with the intention that they shall be acted upon, if the facts are peculiarly within the other party's knowledge or means of knowledge, though they are not exclusively so, and though the party to whom the representa-

tions are made may have an opportunity of ascertaining the truth for himself." 14 Am. & Eng. Ency. of Law (2d ed.) 120.

The principle upon which the rule is based is sanctioned in cases cited in the opinion filed and the decision herein. It is cited merely as a concise summary of the law applicable to the *Bostwick* policy. Such evidence is, in my opinion, sufficient to sustain the judgment. The mere fact that the trial court did not specifically find upon the subject is no good ground for refusing to affirm the judgment so far as it relates to that policy. *Wilkinson v. Wilkinson,* 59 Wis. 560, 18 N. W. 527, and cases there cited; *Jones v. Jones,* 71 Wis. 520, 38 N. W. 88; *Deitz v. Neenah,* 91 Wis. 425, 426, 64 N. W. 299, 65 N. W. 500; *Williamson v. Neeves,* 94 Wis. 656, 69 N. W. 806; *Disch v. Timm,* 101 Wis. 189, 77 N. W. 196; *In re Callahan,* 102 Wis. 561, 78 N. W. 750.

A motion to file a second motion for rehearing was denied February 3, 1903.

NUNNEMACHER, Respondent, vs. Poss and others, Appellants.

November 13, 1902—February 3, 1903.

Corporations: Promissory notes: Signing: Parties bound.

A note reciting that "the Gymnastic Association of the North Side of Milwaukee" and "we the undersigned promise to pay," and signed with the corporate name "by P." and others, who were its officers, but without official designation, binds the corporation, and the officers as individuals.

APPEALS from a judgment and an order of the circuit court for Milwaukee county: LAWRENCE W. HALSEY, Circuit Judge. *Judgment affirmed; appeal from order dismissed.*

Two appeals from the circuit court for Milwaukee county, heard together by stipulation of the parties.

Action to foreclose a mortgage. Appellants *Jacob Poss, August Lindenlaub, Frank Gutzmer, B. W. Kuhn* and *Diedrich Thiele,* were joined as defendants with the mortgagor, the Gymnastic Association of the North Side of Milwaukee, a corporation, upon the ground that they were personally liable for the mortgage debt. The mortgage and note were similarly signed. The note was as follows:

"$25,000.00. Milwaukee, Wis., May 7, 1892.

"Six years after date the Gymnastic Association of the North Side of Milwaukee (called in German 'Der Turn Verein der Nord Seite von Milwaukee') and we the undersigned promise to pay to *Jacob Nunnemacher* or order the sum of twenty-five thousand dollars with interest at the rate of six per cent. per annum, interest payable semi-annually on the 7th days of May and November in each year. Both principal and interest payable at the Merchants' Exchange Bank, Milwaukee, Wis. This note is secured by a real estate mortgage of even date herewith.

"DER TURN VEREIN DER NORD SEITE VON MILWAUKEE, by
"JACOB POSS,
"AUGUST LINDENLAUB,
"FRANK GUTZMER,
"B. W. KUHN,
"DIEDRICH THIELE."

Appellants answered denying that they executed the note otherwise than as officers of the corporation.

Upon the trial it appeared that appellants were, if makers at all, accommodation makers. Evidence was offered in their behalf as to conversations had at the time they affixed their signatures to the instrument as to the capacity in which they acted in the matter, which evidence was ruled out. The court decided that the note was, by its terms, signed by appellants and the corporation as joint makers, and that they were personally liable for the mortgage debt. Judgment was rendered accordingly.

A motion was made after judgment to open the same, and for leave to amend the answer setting up mistake in signing

the note, and for a trial on the pleadings as so amended. The motion was denied and an appeal was taken from the order.

For the appellants there were briefs by *Benjamin Poss,* attorney, and *Nath. Pereles & Sons,* of counsel, and oral argument by *C. F. Hunter.* They contended, *inter alia,* that the court erred in its findings that the defendants *Poss, Lindenlaub, Gutzmer, Kuhn,* and *Thiele* were, in effect, makers of the note accompanying the mortgage, and were therefore personally liable for the mortgage debt. 1 Daniel, Neg. Inst. (3d ed.) § 298; *Draper v. Mass. S. H. Co.* 5 Allen, 338; *Walker v. N. Y. State Bank,* 9 N. Y. 582; *Liebscher v. Kraus,* 74 Wis. 387; *Miller v. Roach,* 150 Mass. 140; *Gleason v. Sanitary M. S. Co.* 93 Me. 544; *Atkins v. Brown,* 59 Me. 90; *Farmers' & M. Bank v. Colby,* 64 Cal. 352; *Robertson v. Pope,* 1 Richardson, 501; *Mott v. Hicks,* 1 Cow. 513; *Rathbon v. Budlong,* 15 Johns. 1; *Roberts v. Button,* 14 Vt. 195; *Castle v. Belfast F. Co.* 72 Me. 167; *Latham v. Houston Flour Mills,* 68 Tex. 127; *Falk v. Moebs,* 127 U. S. 597; *Houghton v. First Nat. Bank,* 26 Wis. 663; *Ballston Spa Bank v. Marine Bank,* 16 Wis. 120; *Reeve v. First Nat. Bank of Glassboro,* 54 N. J. Law, 208; *Bean v. Pioneer M. Co.* 66 Cal. 451; *Barlow v. Congregational Soc.* 8 Allen, 460; *Rice v. Gove,* 22 Pick. 158; *Ballou v. Talbot,* 16 Mass. 461; *Jefts v. York,* 4 Cush. 371; *Long v. Colburn,* 11 Mass. 97; *Emerson v. Providence Hat Mfg. Co.* 12 Mass. 237; *New England M. Ins. Co. v. De Wolf,* 8 Pick. 56; *Morrell v. Codding,* 4 Allen, 403; *Tucker Mfg. Co. v. Fairbanks,* 98 Mass. 101–105; *Brockway v. Allen,* 17 Wend. 40; *Hood v. Hallenbeck,* 7 Hun, 362, 367; *Newmarket S. Bank v. Gillett,* 100 Ill. 254. The court erred in excluding evidence offered by the defendants on the trial to explain the ambiguity on the face of the note. Mechem, Agency, §§ 443, 444; *Kean v. Davis,* 21 N. J. Law, 683; *Deering v. Thom,* 29 Minn. 120; *Pratt v. Beupre,* 13 Minn. 187; *Bingham v. Stewart,* 14 Minn. 214; *Rowell v. Olson,* 32 Minn. 288; *Peterson v.*

Homan, 44 Minn. 166; *Souhegan Nat. Bank v. Boardman,* 46 Minn. 293; *Metcalf v. Williams,* 104 U. S. 93; *Whitney v. Wyman,* 101 U. S. 392; *Hitchcock v. Buchanan,* 105 U. S. 416; *Falk v. Moebs,* 127 U. S. 597; *Baldwin v. Bank of Newbury,* 1 Wall. 234; *Fuller v. Hooper,* 3 Gray, 334; *Slawson v. Loring,* 5 Allen, 340; *Produce Exch. T. Co. v. Bierberbach,* 176 Mass. 577, 589; *Keidan v. Winegar,* 95 Mich. 430; *Kline v. Bank of Tescott,* 50 Kan. 91; *Hicks v. Hinde,* 9 Barb. 528; *McKensey v. Edwards,* 88 Ky. 272, 3 L. R. A. 397; *Schaeffer v. Bidwell,* 9 Nev. 209; *Merchants' Bank of Macon v. Central Bank of Ga.* 1 Ga. 419, 429; *La Salle Nat. Bank v. Tolu Rock & Rye Co.* 14 Ill. App. 141; *Second Nat. Bank v. Midland Steel Co.* (Ind.) 52 L. R. A. 307; *Hager v. Rice,* 4 Colo. 90; *Hovey v. Magill,* 2 Conn. 680; *Shelton v. Darling,* 2 Conn. 435; *Turner v. Thomas,* 10 Mo. App. 338; *Martin v. Smith,* 65 Miss. 1; *Laflin & R. P. Co. v. Sinsheimer,* 48 Md. 411; *Benham v. Smith,* 53 Kan. 495; *Stearns v. Allen,* 25 Hun, 558; *Morrill v. C. T. Segar Mfg. Co.* 32 Hun, 543; *Bush v. Gilmore,* 45 App. Div. 89; *Schmittler v. Simon,* 114 N. Y. 176; *Babcock v. Beman,* 11 N. Y. 200; *Lee v. Methodist E. Church,* 52 Barb. 116; *Hardy v. Pilcher,* 57 Miss. 18; *McClellan v. Reynolds,* 49 Mo. 312; *Bean v. Pioneer M. Co.* 66 Cal. 451; *Richmond, F. & P. R. Co. v. Snead,* 19 Gratt. 354; *Washington Mut. F. Ins. Co. v. St. Mary's Sem.* 52 Mo. 480; *Reeve v. First Nat. Bank of Glassboro,* 54 N. J. L. 208; *Cleveland v. Stewart,* 3 Ga. 283; *Traynham v. Jackson,* 15 Tex. 170.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* and oral argument by *F. C. Winkler.*

The decision was announced November 28, 1902, and the following opinion was filed December 3, 1902:

MARSHALL, J. It must be conceded that if the note sued on is free from ambiguity, it must be taken, without the aid of rules for judicial construction, as indicating the capacity

in which appellants signed it. It seems to admit, reasonably, of but one meaning, viz.: that the individuals signed their names, as well as that of the corporation, to the paper as promisors. The language, "The Gymnastic Association of the North Side of Milwaukee, and we the undersigned promise to pay," seems to leave no room for reasonable controversy but that the name of the company was signed to the note in conjunction with such individuals, not merely by them as agents. The words, "we the undersigned," refer unmistakably to persons other than the corporation. There are no parties aside from it, to which, by any method of reasoning, the words can be said to point, except appellants. The authorities relied on by appellants' counsel to support their contention that there is an explainable ambiguity in the note do not seem to be in point. In *Liebscher v. Kraus,* 74 Wis. 387, 43 N. W. 166, the language of the note was "we promise to pay," no one being named in the body of the paper and it being signed thus:

"San Pedro Mining and Milling Company.
"F. Kraus, President."

The court held that there was nothing in the instrument indicating that there was more than one promisor, there being but one signer, and it being quite common to use the plural "we" in referring to an incorporated company, though that is not strictly correct.

Counsel direct our attention to *Draper v. Mass. S. H. Co.* 5 Allen, 338; *Miller v. Roach,* 150 Mass. 140, 22 N. E. 634; *Gleason v. Sanitary M. S. Co.* 93 Me. 544, 45 Atl. 825; *Atkins v. Brown,* 59 Me. 90; and *Farmers' & M. Bank v. Colby,* 64 Cal. 352, 28 Pac. 118, in each of which cases the plural "we" was used, but not conjunctively with some other person or persons. It was used in a manner clearly indicating that it referred to the promisor signing the paper. Neither of those cases, nor any other to which our attention has been called, justifies the contention that the note before us can

reasonably be read as the obligation of the corporation only. Many cases similar to those mentioned can readily be cited, but none can be found, we venture to say, where two persons named as promisors, conjunctively, in the body of a note, have been satisfied by one in the signature, both persons having signed the paper, because, in form, one signed as agent of the other. No authority of that kind has been found by the attorneys upon either side of this appeal, and we have been no more successful in that field than they. Probably *Healey v. Story,* 3 Exch. 3, is quite as much in point as any case that can be referred to. In the body of the note were these words: "We jointly and severally promise to pay," etc., "on behalf of The Wesleyan Newspaper Association." It was signed by two persons, with the official title of "Directors." In many cases where the note had similar features, omitting the words "jointly and severally," it was held to be the obligation of the corporation only. *Simpson v. Garland,* 76 Me. 203; *Jefts v. York,* 4 Cush. 371; *Jones v. Clark,* 42 Cal. 180; *Haskell v. Cornish,* 13 Cal. 45; *Pearse v. Welborn,* 42 Ind. 331; *Aggs v. Nicholson,* 1 Hurl. & N. 165; *Lindus v. Melrose,* 3 Hurl. & N. 177. But those significant words were held to unmistakably indicate a personal promise on the part of each of the signers of the paper, notwithstanding, in form, they acted for and on behalf of the corporation. That seems to fit the note before us very closely. The naming of the corporation independently of and conjunctively with "we the undersigned," cannot be satisfied without reading out of the paper a promise by the corporation and also one by those referred to by the quoted words.

The motion to vacate the judgment and for leave to amend the answer of appellants, setting up an equitable defense, and for further proceedings upon the amended pleadings, has been considered. We are unable to perceive any abuse of discretion in denying such motion.

By the Court.—The judgment is affirmed and the appeal from the order is dismissed.

A motion for a rehearing was denied February 3, 1903.

BARTLETT and others, Appellants, vs. L. BARTLETT & SON Co. and others, Respondents.

November 13, 1902—February 3, 1903.

Equity: Injunctions, when granted as matter of right? Arbitration and award: Jurisdiction: Remedies: Voluntary associations: Discipline of members: Tribunals therefor: Scope of jurisdiction and authority: Review by courts: Boards of trade: Clerks of members: Agency: Unauthorized contract: Evidence.

1. If by the complaint of the plaintiff there is a probability of a recovery by him, which will be ineffective to vindicate his rights and afford him the full measure of redress which the litigation is competent to furnish unless the defendant, pending its final conclusion, is restrained of his freedom so as to prevent his action prejudicially to the alleged rights of the plaintiff and if without such restraint irreparable damage will accrue to the plaintiff regardless of the final result of the suit, and from such restraint no injury will accrue to the defendant which cannot be adequately guarded against by a bond, it should, as a matter of right, be granted.
2. The award of arbitrators, within the scope of the submission to them, is binding upon the parties concerned. The triors agreed upon are the supreme judges within such scope, not only as to the law but as to the facts, and their decision in respect thereto, however erroneous it may be, tested by abstract principles of right, cannot properly be judicially disturbed.
3. If arbitrators, in reaching a conclusion in respect to a matter before them for decision, go outside of the scope of the submission by disregarding the facts or the rules governing the same, either wilfully or ignorantly, through either good or bad motives, the result will be tainted with jurisdictional error and can be dealt with by the courts at the suit of the injured party if it is prejudicial to his property rights.

4. If arbitrators reach a conclusion by a departure from the scope of the submission, or if, acting therein, they are guilty of misconduct so palpable as not to be reasonably attributable to error of judgment, such conclusion is fatally defective for jurisdictional error.
5. The determination of a disciplinary proceeding by a regularly constituted tribunal of a voluntary association according to its rules is in effect an award of arbitrators, and so long as such proceeding is free from jurisdictional error it is not open to judicial scrutiny. However, like the determination of a *quasi-judicial* body, it is a proper subject for judicial investigation and control as regards jurisdictional error at the suit of any party aggrieved because of an injury to his property rights.
6. In a trial by a tribunal of a voluntary association, of a matter submitted to it under its rules, the laws of the association limit its jurisdiction. The parties immediately interested as disputants stand committed by their relation to the association to abide by whatever result may be reached by the triors within the legitimate field in which they are entitled to go and no further. That includes power to construe the rules of the association as to their jurisdiction and those claimed to have been violated by the member whose conduct is under investigation when such rules will reasonably admit of two constructions, but not otherwise.
7. Clerks of members of a board of trade being disabled from making contracts within its jurisdiction, binding upon their employers, a contract made in violation thereof, unless ratified by the employer of the offending clerk, is, as regards the jurisdiction of the association, absolutely void. The employer of such clerk, upon being charged before the proper tribunal of the association with having violated its laws, by refusing to be bound by the transaction, is entitled to be exonerated upon its appearing that such transaction was neither authorized nor ratified by him. A finding otherwise, reached by testing the rights and obligations of the parties concerned by a standard not found in the laws of the association, is not binding upon the person aggrieved.
8. A person employed to do mere clerical duties in business transactions, who is prohibited from making contracts for his employer, cannot bind the latter by assuming to have such authority and contracting in the name of his employer with a person having knowledge of the scope of his employment, and then passing the void transaction as legitimate in the course of his duties of checking up his employer's trades to avoid mistakes and giving the customary memoranda evidencing such as may

be found upon such verification to be correct. That principle is so well understood that a decision otherwise by arbitrators cannot be attributed to mere error of judgment.

[Syllabus by MARSHALL, J.]

WINSLOW and DODGE, JJ., dissent.

APPEAL from an order of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Reversed.*

Action to enjoin the *Chamber of Commerce* of the City of Milwaukee from expelling or suspending plaintiffs from the chamber for an alleged violation of its rules of organization.

The following facts were set forth in the complaint by appropriate allegations: Since more than one year prior to January 2, 1902, plaintiffs have been partners in business as Bartlett, Frazier & Co., except that during such period, prior to the date mentioned, plaintiff *Pierce* was taken into the firm. The business of the firm has been and is that of dealers in grain and other products and property, and public warehousemen of grain. The members of the firm, except *Pierce,* are members of the defendant *Chamber of Commerce* in good standing, and have been such since prior to November 29, 1901. Their business is extensive and profitable. On November 29, 1901, defendant *L. Bartlett & Son Company* was and since has been a duly organized corporation and a member of said chamber in good standing. Such *Chamber of Commerce* is a corporation, duly organized under the laws of this state. By force of its by-laws, all controversies between its members, of the nature of the one hereafter mentioned between plaintiffs and *L. Bartlett & Son Company,* are required to be submitted by the parties thereto, for settlement, to arbitration, with the right of appeal to a board of appeals of the chamber.

The following are among the by-laws of the corporation:

"If it shall be charged that any member of the association has failed to comply promptly with any contract, either verbal or written, has neglected or refused to comply promptly with the award of any board of arbitration or board of appeals,

rendered in conformity with the rules and regulations of the association; or has refused or neglected to submit any matter of difference to arbitration, it shall be the duty of the board of directors, upon the complaint in writing of the aggrieved party, to consider the matter at any regular, adjourned or special meeting of said board, of which meeting the accuser and the accused shall have had at least six days' notice in writing to attend; and if by a majority vote of the directors present—there being at least six votes in the affirmative—the charges made shall be decided to be sustained, the member in fault shall, by such finding, stand suspended from all privileges of membership until the matter complained of shall have been satisfactorily settled in the judgment of the board of directors. Should, however, the gravity of the offense be deemed such as to merit expulsion, the member in fault may, by a majority of two-thirds of the directors present—there being not less than six votes in the affirmative—be expelled from the association. Any member of the association suspended under the provisions of these rules shall stand suspended until he shall have complied with and performed such further conditions of reinstatement, in addition to those herein provided, as the board of directors may, in its judgment, see fit to impose."

"The duty of the board of arbitration shall be to investigate and decide all disputes and difficulties of a financial and commercial character which may be submitted to it. The statements of the principals and witnesses in each case shall be under oath and be recorded."

"The decisions of the board of arbitration may be appealed from, and the case carried to the board of appeals for its revision, within three business days after a copy of the award of the former committee shall have been delivered to the parties concerned, and by notice of such appeal being given to the secretary; and the secretary shall immediately notify the opposite party of such appeal."

"It shall be the duty of the board of appeals to review such cases as may be appealed from the board of arbitration and formally brought before it; and its decision shall be final and binding upon the parties. The board shall, however, before its decision, receive, under oath, such new evidence as may be offered, and if, in its judgment, evidence is produced which will justify a rehearing of the case by the board of ar-

bitration, it shall remand the case to the said board of arbitration for a new trial. Any final award or finding of the board of appeals shall be based on the record of the board of arbitration, and shall be rendered in the same manner as the awards of the board of arbitration."

Prior to September 18, 1891, clerks of members of the chamber were authorized to do business in the exchange room for their employers, but not for themselves or any other person, firm or corporation. On such day the rule on the subject was amended to read as follows:

"Any person holding a clerk's ticket shall have the right of entrance to the exchange room, but shall not have the right to transact any business for his employer, himself or any other person, firm or corporation. Any clerk's ticket and the payment therefor may be declared forfeited by the board of directors upon satisfactory evidence that the holder of the same has violated any of the privileges granted by it."

The rule as so amended has been, since the date mentioned, enforced. November 29, 1901, Walter E. Brown was a clerk for plaintiffs, entitled to be admitted as such to the floor of the exchange, but without authority to do anything in violation of such rule. *L. Bartlett & Son Company,* on such date, with knowledge of Brown's disability under the rules of the chamber, to make trades within its jurisdiction, recognized him as having authority to do so by purchasing, ostensibly of him as agent of plaintiffs, the privilege of calling on them to sell to said *L. Bartlett & Son Company,* at any time prior to the close of business of the chamber regularly held on the floor of the exchange, December 7, 1901, 50,000 bushels of wheat, contract grade, for delivery in May of the year 1902, and upon the next day caused Brown, as clerk for plaintiffs, to check up said transaction as that of plaintiffs and exchange with it memoranda thereof. Plaintiffs repudiated such transaction as soon as they were informed thereof. With a view to having the controversy as to whether such transaction was binding upon plaintiffs settled in the manner required by the rules of the chamber, December 13,

1901, *L. Bartlett & Son Company* duly lodged a complaint in writing against them, with the secretary of the chamber, setting forth the making of the trade, with all the particulars thereof, and alleging that on the morning thereafter, according to custom in conducting business on the floor of the exchange, Brown, whom plaintiffs had for a long time intrusted with the work of checking up their trades and giving memoranda thereof and paying and receiving money in respect thereto in the usual way, checked up the disputed trade, gave the customary memorandum thereof, made out by him with plaintiffs' initials thereon, and received from the corporation the value of the privilege, $62.50; that December 7, 1901, the corporation demanded to exercise its privilege in the customary way; that plaintiffs refused to recognize its right in the matter by selling to it the grain called for; that thereupon it liquidated its damages for plaintiffs' breach of contract, at $1,843.45, by buying in the open market on the floor of the exchange, in the usual way, the amount of May wheat it was privileged to purchase of plaintiffs. On such showing *L. Bartlett & Son Company* asked the board of arbitrators of the chamber to award it, against plaintiffs, the said sum of $1,843.45. To that complaint plaintiffs answered under the rules of the chamber, setting forth the facts before detailed as to Brown's want of authority and their prompt repudiation of his violation of the rules of the chamber. The arbitrators decided, upon evidence submitted for their consideration, that plaintiffs never authorized or ratified Brown's act in attempting to make a trade for them; that the money received by him from *L. Bartlett & Son Company* never came to their hands, but was dishonestly retained by him; that he was under disability to bind them in the matter under the rules of the chamber; that it was outside the scope of his employment; that he had no actual authority to make the trade, and that his legitimate duties as clerk for them gave him no apparent authority to do so. The complaint was therefore dismissed.

The complainant appealed to the board of appeals, which, wholly on the record of the proceedings before the arbitrators, decided that if the trade in question as originally made was void, Brown's act in checking up the transaction and delivering the memorandum thereof to *L. Bartlett & Son Company,* according to the usual custom, ratified the transaction, and that complainant was entitled to recover the full amount of damages claimed, $1,843.45, and $81, cost of the arbitration proceedings. In making such decision the board of appeals wilfully violated the rules disabling clerks of members of the chamber from making trades within its jurisdiction, for their employers, and in so doing exceeded its jurisdiction and committed an inexcusable mistake of law. Plaintiffs have refused to abide by such award solely upon the ground that it is void for the jurisdictional error aforesaid. By reason thereof *L. Bartlett & Son Company* have instituted proceedings under the rules of the chamber to have plaintiffs punished by exclusion or suspension from such chamber unless they comply with the award; and if not restrained by the court the purpose of such proceedings will be consummated. Plaintiffs' business is of such a character that if their status as members of the chamber in good standing is disturbed as threatened, they will be greatly and irreparably damaged, and their damages will be of such a character that the same cannot be estimated and measured in money. A permanent injunction was prayed for, restraining the chamber from disciplining plaintiffs because of their refusal to abide by the award, and a temporary injunction, preserving the existing conditions of things pending litigation, was requested.

L. Bartlett & Son Company answered, setting forth the facts heretofore detailed respecting the transaction between it and Brown, and alleged that he was, at the time thereof, authorized and empowered, and held out to the world as entitled, to make for them such trades as the one in question; that he had been accustomed to do business of that kind

openly and to their knowledge before the amendment of the rules mentioned in the complaint, and that his authority to continue as before was not thereafter revoked by any act on the part of plaintiffs. The answer set forth the facts relating to the trial of the controversy, respecting plaintiffs' liability under the rules of the chamber and the result thereof as heretofore detailed, and alleged that all the questions raised by the complaint, including the effect of the rule of the chamber as to clerks doing business for their employers, as regards whether it merely renders a clerk violating it liable to punishment, or, in addition, renders the trade made by him void, were submitted to the arbitrators and board of appeals and were irrevocably closed by the final decision. The answer further set forth the rules of the chamber showing, among other things, that if the award of the board of appeals is valid, the board of directors has no discretion as to whether plaintiffs should be disciplined for their refusal to abide thereby. It also set forth the evidence taken by the arbitrators. Such evidence is to the effect, in part, that it was one of Brown's regular duties to check up his employers' trades and deliver the customary memoranda thereof and receive money thereon; that prior to the amendment of the rule disabling clerks of members of the chamber from making trades for their employers, Brown had made trades upon the floor of the exchange for plaintiffs, and without any objection from them; that they had ratified such trades. There was further evidence showing that Brown made one trade after the amendment of the rules, which plaintiffs recognized, feeling honorably bound to do so, but that it was not a trade within the jurisdiction of the chamber. There was evidence tending to show that plaintiffs kept Brown in their employ after they knew that he was not reliable, and that they had such knowledge, before the transaction in question. The evidence on the part of the plaintiffs was unequivocal that they never authorized Brown to make any trade for them in violation of the

rule disabling him from doing such business, and that they never recognized or ratified any violation of the rule by him as binding upon them.

The defendant *Chamber of Commerce* and other defendants joined in an answer, setting forth, among other things, that in the proceedings before the arbitrators and before the board of appeals, the following questions were submitted for decision: Was Walter E. Brown authorized by Bartlett, Frazier & Co. to make the trade in question with *L. Bartlett & Son Company,* said Brown being a clerk in the employ of the firm of Bartlett, Frazier & Co.? Did said *Bartlett & Son Company* have a right to assume that Brown had implied authority from Bartlett, Frazier & Co. to make the trade in question? Did Bartlett, Frazier & Co. ratify said trade by the receipt of the consideration, $62.50, and the exchange of written ratifications, and otherwise, notwithstanding the consideration was paid to Brown and the ratification was given in Bartlett, Frazier & Co.'s name by him, it being part of his regular duties, on behalf of plaintiffs, to ratify trades and collect the consideration? Said answer stated the result of the trial before the arbitrators, and of the hearing upon the appeal to the board of appeals, and alleged that all the proceedings in the matter were strictly in accordance with law, and without any wilful or other violation of the rules of the chamber.

There was an affidavit on behalf of Bartlett, Frazier & Co. setting forth, among other things, that Brown, in making the transaction in question, acted without any authority from Bartlett, Frazier & Co., either express or implied, and that in all cases where Brown delivered confirmation cards or memoranda in his capacity as clerk for plaintiffs, in the confirmation of their board trades, such transactions were confined to cases where a previous valid contract had been made with an authorized representative of the firm; that in the common and well-known custom of dealings in the *Chamber*

of Commerce of the city of Milwaukee, such work is, as a rule, performed by clerks having no authority to make trades; that such work does not involve a ratification of trades, but simply a checking over of contracts previously made by authorized persons, for the purpose of avoiding errors.

Two motions were made upon the pleadings and the affidavit, to vacate the temporary injunction, one being made by *L. Bartlett & Son Company,* and the other by the *Chamber of Commerce* and its codefendants aside from *L. Bartlett & Son Company.* The motions were granted and plaintiffs appealed.

For the appellants there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas,* attorneys, and *George P. Merrick* and *Henry S. Robins,* of counsel, and oral argument by *Mr. Merrick, Mr. Robbins* and *Mr. F. C. Winkler.*

For the respondent *L. Bartlett & Son Co.* there was a brief by *Hoyt & Olwell,* and for the respondents the *Chamber of Commerce of Milwaukee* and its directors there was a separate brief by *Miller, Noyes & Miller,* and oral argument by *George P. Miller* and *F. M. Hoyt.* They contended, *inter alia,* that the award of the board of appeals of the *Chamber of Commerce* is conclusive both as to the facts and as to the law, and, even if erroneous, cannot be reviewed by the courts. *Consolidated W. P. Co. v. Nash,* 109 Wis. 490–503; *McCord v. Flynn,* 111 Wis. 78–88; 2 Am. & Eng. Ency. of Law (2d ed.), 778, 786, 787; *Boston W. P. Co. v. Gray,* 6 Met. 131; *Burchell v. Marsh,* 17 How. 344; *Fudicker v. Guardian Mut. L. Ins. Co.* 62 N. Y. 392; *Meldrow v. Norris,* 2 Cal. 74; *Fairchild v. Adams,* 11 Cush. 549, 555; *Smith v. B. & M. R. Co.* 16 Gray, 521; *Cutting v. Stone,* 23 Vt. 571; *Pitcher v. Board of Trade,* 121 Ill. 412, 420; *Ryan v. Cudahy,* 157 Ill. 108; *In re Haebler v. N. Y. Produce Ex.* 149 N. Y. 414; *Sperry's Appeal,* 116 Pa. St. 391; *Woolsey v. I. O. O. F.* 61 Ia. 492; *Osceola Tribe No. 11, I. O. R. M. v. Schmidt,* 57 Md. 98; Angell & Ames, Corp. (11th ed.) § 418; *Belton v.*

Hatch, 109 N.Y. 593; *O'Brien v. Grant,* 146 N.Y. 163, 173; The award of the board of appeals was proper. The trade was within the apparent scope of Webster's authority. Mechem, Agency, sec. 223; *Kelly v. Phelps,* 57 Wis. 425; *Barkley v. R. & S. R. Co.* 71 N. Y. 205; *Hatch v. Coddington,* 95 U. S. 48; *Wright v. Herrick,* 128 Mass. 240; *Gilchrist v. Brande,* 58 Wis. 184; *Claflin v. Lenheim,* 66 N. Y. 301; *Zoller v. Jovin,* 48 N. H. 324; *Wilson v. Noonan,* 27 Wis. 598, 608; *Godfrey v. Schneck,* 105 Wis. 568. The appellant is liable on the ground of negligence. Wharton, Negligence, § 238; *Wright v. N. Y. Cent. R. Co.* 25 N. Y. 562; *Davis v. D. & M. R. Co.* 20 Mich. 105; Wood, Master & S. sec. 432.

MARSHALL, J. If the complaint states a good cause of action, there is at least a probability that appellants are entitled to a decree for the relief prayed for. If that should be the final result of the litigation, yet respondent *Chamber of Commerce* be allowed in the meantime to do the mischief threatened, it is reasonably certain that the object of the suit will be in a great measure defeated. A judgment in their favor, if the *status quo* is not preserved pending the litigation, will leave them irreparably injured; while if it is preserved, we are unable to see how any damage of a serious character can accrue to the chamber if it finally prevails,—certainly none that cannot be adequately guarded against by security. In that situation, assuming for the purposes of this point that the complaint states good grounds for relief, appellants are entitled, as a matter of right, upon reasonable terms, to the temporary restraint which was denied them. *Valley I. W. Mfg. Co. v. Goodrick,* 103 Wis. 436, 78 N. W. 1096; *Milwaukee E. R. & L. Co. v. Bradley,* 108 Wis. 467, 84 N. W. 870. So this appeal turns upon the sufficiency of the complaint.

There is little need to spend time discussing the general principles regarding when a court of equity will interfere to

protect a member of a voluntary association from the judgment of its tribunal on a matter submitted to it under its rules. It must be freely conceded that the laws of such an association, within its own sphere of action, so long as they do not violate any public law, written or unwritten, as administered by its tribunal, are supreme. The trial by such a tribunal is, to all intents and purposes, an arbitration, its judgment an award of arbitrators, and the enforcement thereof subject to be enjoined by a court of equity for the same causes that will admit of any other award being so controlled. It may be so enjoined if it manifestly violates private rights, causing loss to a person, if he has no other adequate remedy. Such rights are deemed to be so violated when the tribunal exceeds its jurisdiction either when, intending to decide according to law, it misapprehends the law, or when it prejudicially goes outside the scope of the matters submitted, or is guilty of any other error affecting the result, other than errors of judgment. A disregard by arbitrators of the facts or the rules governing the matter before them either wilfully or ignorantly, from either good or bad motives, or from whatever cause, is jurisdictional; while mere errors of judgment, either upon the law or the facts, do not vitiate an award. These principles were discussed at considerable length in *Consolidated W. P. Co. v. Nash,* 109 Wis. 490, 85 N. W. 485. As there stated, in effect, whether arbitrators proceed on a basis so clearly wrong as to not be attributable to errors of judgment, or depart from the scope of the submission, or are guilty of any misconduct affecting the result, errors of judgment upon the law or the facts not being deemed misconduct, the result is the same: the award is fatally defective for jurisdictional error.

Applying the foregoing to the complaint before us, the question of whether it states a good cause of action comes down to this: Did the board of appeals of the respondent *Chamber of Commerce,* in making its award, commit juris-

dictional error affecting such award, injurious to appellants? Manifestly, the board was bound by the laws of the corporation the same as appellant. The latter, in submitting to its jurisdiction, agreed to be tried by the rules of the chamber, not by any standard of trade ethics which the board might see fit to set up. If the rules were open to construction, it was undoubtedly the province of the board to construe them. If it erred in judgment in doing so, appellants stipulated in advance to submit thereto. If the rules by which appellants' rights were to be tested were not open to construction because not reasonably susceptible of more than one meaning, or if, instead of attempting to construe the rules and apply the same to the case in hand, the board ignored them and adjudged appellants' rights upon an entirely false standard—one not found in the rules or the law it attempted to follow—then its award does not embody a decision upon the matter submitted according to the judgment of the board, but it is a mere expression of arbitrary will.

Now the question submitted to the arbitrators was this: Are Bartlett, Frazier & Co. guilty of having offended against the rules of the *Chamber of Commerce* of Milwaukee in that they failed, upon due demand therefor, to comply with an agreement made with *Bartlett & Son Company* November 29, 1901, to, at the option of the holder, at any time before the close of business on the exchange floor of such chamber December 7, 1901, sell to said *Bartlett & Son Company* 50,000 bushels of wheat, contract grade, for time delivery, to the damage of such company, liquidated, in the usual manner in such cases, at $1,843.45, and fail, upon due demand therefor, to pay such sum or any part thereof? There was no pretense that such contract was made unless Bartlett, Frazier & Co. were bound by the assumption of authority on the part of their clerk, Walter E. Brown, to act in their behalf, either in making the verbal agreement with *Bartlett & Son Company* or in subsequently doing the customary clerical work of

checking the same up to avoid mistakes and delivering the usual memorandum evidencing the transaction. Much evidence was taken on the hearing, but none showing that Bartlett, Frazier & Co. personally knew of the transaction in the first instance, or of the so-called confirmation of it, until a long time thereafter, or that they ever, by any act, ratified it, or authorized their clerk to represent them in such matters on any previous occasion, subsequent to the amendment of the rules, prohibiting clerks of members of the *Chamber of Commerce* from making trades. The board decided on that state of the case that appellants did not make any trade with *Bartlett & Son Company* which could be recognized under the rules of the corporation. The question being carried to the board of appeals, it held that *Bartlett & Son Company* was entitled to recover, not because the rule prohibiting clerks of members from doing business for their employers does not void a trade made in violation thereof, but because Brown's treatment of his void act as that of his employer, in performing his legitimate duty of checking up deals, claimed to be binding upon them, and delivering the usual memoranda of the transactions, made such void act valid, the same in all respects as if it were originally that of the appellants, and because, "upon all the evidence complainant should recover damages." Since the evidence referred to, at no point, shows that Bartlett, Frazier & Co. had any connection with the transaction in controversy except through Brown, or that he was recognized by them as having authority either to make or ratify trades which were within the jurisdiction of the chamber, after the rule referred to was adopted, we must conclude that the words, "Upon all the evidence complainant should recover damages," are either merely explanatory of what preceded them, or indicate an arbitrary disposition of the matter in hand. They probably refer solely to the proof showing that Brown, subsequent to the adoption of the rule, was authorized and accustomed to do the usual clerical work

of checking up his employer's trades and delivering the customary memoranda to the other parties to the transactions, and that he performed that duty in respect to the matter in question, and by so doing made his unauthorized trade valid. We cannot escape the conclusion, whichever view is taken, that the decision was reached, not by applying the rules of the chamber to the case, but by ignoring them; that the board proceeded as if there was no certain test by which to determine the rights of appellants; that it was permitted to say what was just without any guide but the notions of its members, and that appellants were bound thereby. It did not disturb the decision of the arbitrators that a trade made by a clerk in the name of his employer is wholly void because of the rule disabling him from doing such business, yet held that a clerk, in performing his appropriate duties can, in an indirect way, avoid the disability. The view is so unreasonable, that the general prohibition against clerks doing business for their employers can be entirely circumvented by the effect of the performance of their legitimate duties, that we conclude that the board did not consider the rule in question, but disposed of the matter in hand on its notions of equity as between the persons interested. In that the board plainly exceeded its jurisdiction. It did not merely commit an error of judgment. It was plainly fenced about by the law of the chamber, and the appellants were as well. It was bound to keep within its enclosure, and, operating there, determine whether appellants had kept within theirs. That was what the latter, as member of the chamber, and by joining in the proceedings as well, were bound to submit to. The board exceeded its jurisdiction as clearly as the arbitrators did in *Consolidated W. P. Co. v. Nash,* 109 Wis. 496, 85 N. W. 485, in adopting an obviously absurd construction of the contract which defined the scope of the submission to them; or in *Ryan v. Cudahy,* 157 Ill. 108, 41 N. E. 760, where the arbitrators, in a trial under the rules of the Chicago Board of Trade, re-

fused to accord to a party to the controversy the privilege of making proofs, which he was expressly entitled to by such rule.

A trial by a tribunal of a board of trade, provided for by its rules, or that of any other voluntary organization, is like one before a board of arbitrators agreed upon by parties to the controversy submitted to them. Its scope is limited by the rules of the organization. A violation thereof is jurisdictional error which will vitiate the result; and if private rights of a contestant are injuriously affected thereby, a court of equity can afford relief. Such is the effect of the decision in *Ryan v. Cudahy, supra.* It merely follows elementary principles. We venture to say that the rule is universal that if a board of arbitrators exceeds its jurisdiction to the injury of property rights of any party to the proceedings before it, and there is no other way of reaching the matter, a court of equity will take jurisdiction to afford such relief as it is capable of.

We do not deem it necessary or advisable to support the principles above referred to by citing authorities to any considerable extent. They are deemed to be elementary. The jurisdiction of arbitrators is absolutely and strictly limited by the contract of submission, whether such contract be one formally entered into between the parties or be implied from their being members of a voluntary organization which by its rules requires them to submit their differences to the particular tribunal. The jurisdiction of the arbitrators cannot be extended beyond the contract of submission by their decision upon any jurisdictional question. When the submission requires the matters to be determined to be tested by a particular rule, whether it be a rule of law or a rule of the corporation or association, the adoption by the arbitrators of a different rule or a disregard of the rule and decision of the matter according to the notions of the arbitrators of what is just in the premises, is a departure from the submission just the

same as the inclusion in the submission of matters of difference not involved at all in the particular controversy to be settled. 3 Cycl. Law & Proc. 674, 675, and cases cited; Morse, Arb. 182. Here the question of whether appellants were guilty of having violated the rules of the chamber depended upon whether clerks of members were disabled by its rules from making trades for their employers. That was decided by the arbitrators in appellants' favor. The board of appeals, without touching that question, as we have seen, but applying to the matter before them an idea not found in the rules of the chamber or the law, or supported by reason—the idea that a person acting as agent for another may avoid disability to make a contract for his principal with one having knowledge of such disability, by ignoring such want of authority and subsequently, without any change in his competency, ratifying his void act—held that appellants ought to pay the damages claimed.

The idea is advanced that the board was warranted in holding appellants liable independent of the rule, because (1) they held out Brown as worthy of confidence, knowing that he was otherwise; (2) authority to him to check and approve accounts necessarily carried with it authority to approve trades, making them binding whether they were previous to the approval or not; (3) they had, previous to the transaction in question, recognized his trades. What we have said really covers all those suggestions. If it be admitted that appellants kept Brown in their employ after they had knowledge that he was not reliable, that did not affect his disability under the rule of the chamber, as to dealing with those who had full knowledge of his disability. As to the second proposition, we say that to hold that authority to check and approve trades is consistent with the decision that the rule created absolute disability of the clerk to make the trade was the adoption of a principle wholly inconsistent with the one the submission re-

quired the board to try appellants by. As to the last proposition, this seems to be conclusive: There is no evidence showing that appellants, after the disability of the clerk was created by the rule, recognized any contracts made by him that were within the jurisdiction of the chamber. A decision to the contrary without any evidence whatever to support it is jurisdictional error.

From what has been said the conclusion must follow that the complaint states a good cause of action. It sets forth, by appropriate allegations, that a controversy between appellants and *Bartlett & Son Company,* which was within the jurisdiction of the tribunals of the *Chamber of Commerce* of the City of Milwaukee to determine, was tried before such tribunals; that the award was against appellants; that the result was reached by the highest authority in the chamber having jurisdiction of the subject; that it exceeded its jurisdiction in the matter by ignoring the rule vital to appellants' rights; that the decision, if allowed to be carried out, will seriously affect their property rights; that it will be carried out unless the court intervenes and prevents the same; and that appellants have no other way of protecting themselves from the threatened injury except by an appeal to the equity jurisdiction of the court.

It must be understood that this decision does not invade in the slightest degree the familiar doctrine that the determinations of the regularly constituted tribunals of a voluntary association, regularly made, on a subject within their jurisdiction, are not open to judicial scrutiny. The court, however, may look into the proceedings of such a tribunal to the extent of seeing whether, to the injury of the complainant, it exceeded its jurisdiction, the same as in case of a *quasi*-judicial body.

The result of the foregoing is that we must hold that the order vacating the temporary injunction is erroneous and

must be reversed, and the cause be remanded for further proceedings according to law.

By the Court.—So ordered.

BARDEEN, J. I concur in the foregoing opinion.

WINSLOW and DODGE, JJ., dissent.

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116 468
116 540

MUELLER, Respondent, vs. NORTMANN, Administrator, and others, Appellants.

December 19, 1902—February 3, 1903.

Option contracts: Vendor and purchaser of land: Specific performance: Equity: Acceptance of option after death of vendor: Agency: Revocation.

1. A mere option does not ripen into a contract and become a binding obligation upon the grantor unless accepted by the holder within the time limited therein, and according to its terms, but the rights of the parties thereunder expire on the date limited without notice, or declaration of forfeiture.
2. K., defendant's intestate, for valuable consideration, gave plaintiff written option to purchase certain lands, which provided, among other things, that, in case plaintiff elected to make the purchase, he was to pay a certain sum to M., at a designated place, within four weeks from the date of the option, and that thereupon K. would deliver a deed of the premises to plaintiff. Within the life of the option, but after the death of K., plaintiff made a tender of the required amount at the place designated. Plaintiff brought action for specific performance. *Held*, that K. could not have withdrawn the option in his life time, and that the death of K. did not revoke the right of plaintiff to make his election within the time limited, nor did it revoke the authority of the person in charge of the place designated to accept the sum tendered.
3. In such case, the plaintiff, having done everything that the option required him to do, is entitled to specific performance of his contract against the decedent's heirs.

APPEAL from a judgment of the circuit court for Milwaukee county: WARREN D. TARRANT, Circuit Judge. *Affirmed.*

On December 3, 1901, one Fred J. Klein gave the plaintiff, in consideration of $25 to him paid, an option in writing to purchase certain described property in the city of Milwaukee, which option contained the following clause:

"In case said *J. F. Mueller* elects to purchase said land under this option, he is to pay at the office of Theo. Mueller, in Milwaukee, Wis., within four weeks from date thereof, forty-nine hundred and seventy-five dollars, when a warranty deed of said land shall be delivered, conveying said land free and clear of all incumbrances, and a complete abstract of title shall be furnished."

Said option was duly recorded. On December 9th thereafter, Klein died intestate. Within the period above limited, and on December 31, 1901, the plaintiff elected to purchase said land, and tendered at the office of said Theo. Mueller the sum mentioned in the option; but said Mueller refused to accept the same, giving as his reasons therefor that Klein was dead. February 10, 1902, the defendant *C. J. Nortmann* was duly appointed administrator of Klein's estate. The other defendants are children and heirs at law of Klein. The plaintiff brings this action to enforce specific performance of said option contract. The court found the facts as above stated, and that all the allegations of the complaint were true and proven, and that plaintiff had duly performed the contract on his part. The defendants filed due exceptions, and from a judgment entered for plaintiff, bring this appeal.

For the appellants there were briefs by *Markham & Hamilton,* attorneys, and a separate brief by *Fred C. Ellis,* guardian *ad litem,* and oral argument by *T. Hamilton.*

For the respondent there was a brief by *Nath. Pereles & Sons,* attorneys, and *G. D. Goff,* of counsel, and oral argument by *Mr. Goff.*

BARDEEN, J. It is wholly unnecessary in this case to discuss the law of so-called "option contracts." Both parties substantially agree that a mere option does not ripen into a contract, and become a binding obligation upon the grantor, unless accepted by the holder within the time limited therein, and according to its terms (*Cheney v. Cook,* 7 Wis. 413; *Atlee v. Bartholomew,* 69 Wis. 43, 33 N. W. 110), and that rights under such an option expire on the date limited, without notice or declaration of forfeiture (*Cummings v. Town of Lake Realty Co.* 86 Wis. 382, 57 N. W. 43; *Nelson v. Stephens,* 107 Wis. 136–145, 82 N. W. 163). While the option may be but an offer to sell, yet if the seller, for a good consideration, agrees that he will not withdraw his offer until a specified time, he is bound. *Peterson v. Chase,* 115 Wis. 239, 91 N. W. 687, and cases cited. In the case at bar the seller agreed, upon a valuable consideration, that the offer should remain open for four weeks. Within that period the plaintiff did everything that the written option required him to do. He went to the office designated, and tendered the sum specified, as his election to complete his option. That tender was to the very person designated in the option, at whose office the money was to be paid. The payment of the money at the place stated was the only condition imposed upon the purchaser. But the appellants argue that the death of Mr. Klein revoked the authority of any one at Mr. Mueller's office to accept the money, on the ground that death revokes all agencies. If the contract was one the intestate could not have revoked in his lifetime, then his heirs or legal representatives have no greater right. *Raesser v. Nat. Ex. Bank,* 112 Wis. 591, 88 N. W. 618. His death did not invoke the right of the buyer to make his election within the time limited. The tender at the place designated was all that the option required of him. When he asked the court to enforce the contract, he made his tender good by offering to pay, and the relief granted him was on condition that he pay the amount agreed. The ap-

pellants argue that plaintiff should have had a special administrator appointed, to whom tender and notice could have been given. Even admitting this would have been proper, have they suffered or lost anything by such failure? Have their rights been prejudiced in any degree by reason thereof? Certainly not. The suggestion that it would be a great hardship for the parties interested in the estate "to hunt throughout Christendom to learn that the option had not been accepted by the grantee" is worthy of but slight consideration. An inquiry at the office where the money was to have been paid would have saved the "hunt throughout Christendom," and relieved the parties of their imaginary woes. Our conclusion is that the so-called option was one which Klein could not have withdrawn in his lifetime, and that its terms remained open to plaintiff's election up to the expiration of the date mentioned therein. The plaintiff's tender of the money at the office of Theo. Mueller was a sufficient election of his intention to purchase, and that no valid objection is shown by the record why the contract should not be specifically enforced.

The judgment appears to have properly preserved the rights of the appellants, and should therefore be affirmed.

By the Court.—So ordered.

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116 471
117 219

THE BOHN MANUFACTURING COMPANY, Appellant, vs. REIF and others, Respondents.

January 13—February 3, 1903.

Bills and notes: Individual signers: Pleading: Novation: Consideration: Evidence: Estoppel.

1. An ordinary promissory note, signed by defendants individually as makers, contained an option of payment in lumber at going rates. The note was a plain, unambiguous, and complete document, and, when construed with the accompanying agreement,

left nothing for explanation. In an action thereon the answer alleged, among other facts, that prior to the giving of such note the defendants, to the knowledge of the plaintiff, had agreed to form a corporation, and gave the note in suit with the understanding that they were signing a note for the proposed corporation, and that plaintiff received it with that understanding; that the corporation was afterwards formed, and, before the maturity of the note, it offered to pay the note in lumber, but plaintiff declined to receive the same. There was no mutual mistake alleged, nor any attempt to state any claim for equitable relief, nor was there any counterclaim for reformation. *Held*, that the answer in that respect stated no defense, and parol evidence was inadmissible for any purpose thereunder.

2. Such answer further alleged that the note was always considered a liability of the corporation by both plaintiff and defendants; that plaintiff made a written agreement with the corporation to take certain lumber in payment of the note, which the corporation was willing to deliver, but which plaintiff neglected to take; that afterwards the corporation made a voluntary assignment for the benefit of creditors, and that plaintiff filed therein a duly verified claim for the amount due upon the note, treating the corporation as the maker thereof, and received a dividend thereon. It was not alleged that the agreement of the corporation to pay was based upon any consideration, nor was it alleged that the plaintiff ever assented to any discharge of the defendants from liability thereunder. *Held*, that the facts stated were insufficient to show a release of defendants by novation, and in that respect the answer failed to state a defense.

3. The executive officers of a payee of a note, signed by defendants as individuals, testified positively that they never had any knowledge of an alleged agreement whereby a corporation, formed by defendants, assumed and agreed to pay the note; that they never consented to make, and were never asked to make, a substitution of debtors. *Held*, that the fact that the payee had considerable correspondence with such corporation, and agreed to accept lumber from it in discharge of the note, and subsequently proved the note as a claim against the corporation, it having made an assignment for benefit of creditors, was not in itself sufficient to show knowledge by the payee of an assumption of the debt of the corporation.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This is an action to recover the amount due upon a prom-

issory note. The complaint alleges the execution and delivery by the defendants to the plaintiff on or about October 1, 1895, of a promissory note in the following form:

"$3,000. St. Paul, Minn., Sept. 20, 1895.

"On or before one year after date, I promise to pay to the order of *Bohn Manufacturing Company* three thousand dollars, at Manitowoc Savings Bank, Manitowoc, Wis. Value received. With interest before and after maturity at the rate of 7 per cent. per annum until paid. Subject to optional payment as per agreement of *Bohn Mfg. Co.* under date of Sept. 24, '95.

"PETER NIKOLAI,
"JULIUS HAMANCHECK,
"ANTON E. REIF,
"LEWIS C. REIF,
"HENRY KIEL,
"MATHAS STAMBOCH."

That the agreement of optional payment referred to in the note, which was made at the time of the execution and delivery of the note, was as follows:

"St. Paul, Minn., Sept. 24, '95.

"Messrs. Reif Bros. and others.
"Branch, Wis.

"*Gentlemen:* We hereby agree to buy from you $3,000 worth of lumber within one year from date, in case you desire to sell it to us, at the market price f. o. b. St. Paul; the price to be governed by what the lumber can be bought for from other mills. We agree to do this in consideration of your signing a note for $3,000, due on or before one year from September 20th, which you have given us in part payment of certain sawmill machinery which we have sold you.

"Truly yours,
"BOHN MANF'G. CO."

That said agreement of purchase was made at the time of the execution and delivery of said note. That no lumber whatever has been received by the plaintiff, pursuant to said agreement, from the defendants, or either or any of them, or from any other person on their account, and the defendants

have never exercised their option to pay said $3,000, or any part thereof, in lumber, if any such option was reserved to them by said writing, except the payments hereinafter admitted. The complaint shows payment in lumber to the amount of $442.42, paid and indorsed January 14, 1897, as per statement rendered on that date by the Reif Lumber & Manufacturing Company for lumber sold plaintiff, labor performed on its account, and rent and advances made to that date, and excepting the further payment of $572.80 paid and indorsed on said note on April 27, 1898, paid by John R. Ragan, assignee of the Reif Lumber & Manufacturing Company, which company was a corporation under the laws of the state of Wisconsin, and which sum was paid by said Ragan as a dividend payable by him as assignee of said Reif Lumber & Manufacturing Company, payable to its creditors. That the plaintiff is the legal holder of the note. That no other payments have been made thereon. That there is due from the defendants to the plaintiff, by virtue of the premises, $2,942.12.

The defendants *Anton Reif, Lewis Reif, Mathas Stamboch,* and *Peter Nickolai* answered the complaint substantially as follows: The answer admits the incorporation of the plaintiff, and alleges that the defendants entered into a mutual agreement to form a corporation for the purpose of engaging in the manufacturing and sale of lumber prior to September 20, 1895, and that such agreement was well known to the plaintiff, and that on or about September 20, 1895, the defendants purchased of the plaintiff a saw-mill for the sum of $5,000; $2,000 to be paid in cash, and the balance in lumber. That such purchase was made for and in behalf of the corporation then forming, as was well known by the plaintiff. That pursuant to said agreement of purchase, and in consideration of plaintiff's written agreement to take lumber as set forth in the complaint, the defendants signed the note in suit, and with the understanding that they were signing a note for the cor-

poration then forming, and that the plaintiff well knew this to be so, and received and accepted said note as of such corporation. That shortly after and pursuant to said agreement the defendants incorporated under the name of Reif Lumber & Manufacturing Company, and that said corporation took charge of said sawmill, and engaged in the business contemplated by said agreement and purchase. That prior to and at the maturity of said note the Reif Lumber & Manufacturing Company offered to sell lumber to the plaintiff, and offered it the opportunity to select lumber from its stock in the yard in payment of said note, but that the plaintiff neglected or declined to receive the same. That said note was at all times considered as a liability of the said Reif Lumber & Manufacturing Company by said corporation as well as by the plaintiff, and that the sum of $442.42 alleged in the complaint to have been paid in lumber, and indorsed on said note, was paid by said Reif Lumber & Manufacturing Company, and so received by the plaintiff. That in February, 1897, said plaintiff and said Reif Lumber & Manufacturing Company entered into another agreement in writing, wherein the prices of various kinds of lumber and grades of lumber were specified, and whereby it was agreed that the plaintiff was to select and take a sufficient quantity of lumber in the yard to pay said note in full. That an agent of the plaintiff was then on the ground to select and take lumber, and that said Reif Lumber & Manufacturing Company was then ready and willing to load all the lumber selected by the plaintiff on the cars, but that plaintiff neglected to so select and take any lumber whatever so offered and pointed out. That in April, 1897, said Reif Lumber & Manufacturing Company made a voluntary assignment for the benefit of its creditors. That the payment of $572.80 on April 27, 1898, alleged in the complaint, was paid to the plaintiff by the assignee of said corporation, with whom the plaintiff had filed a duly verified claim for the amount due on said note, on which note the said Reif Lumber

& Manufacturing Company was not an indorser, as alleged in the complaint, but was considered and treated by the plaintiff as the maker and payor of said note. That these defendants were not personally liable upon said note, but that said note is the debt of the said Reif Lumber & Manufacturing Company, and not of these defendants, and that at no time was payment ever demanded of these defendants by the plaintiff.

Upon the trial of the case before a jury, the plaintiff objected to reception of any evidence under the answer, because it stated no defense. The objection was overruled, and exception taken. At the close of the entire evidence the plaintiff moved that a verdict be directed for the plaintiff, which motion was overruled, and exception taken. The following special verdict was rendered by the jury:

"1. At or about December 30, 1895, and after the Reif Lumber & Manufacturing Company was organized as a corporation, in the fall of the year 1895, did the defendants turn over and transfer to that company the property which had been sold by the plaintiff, and for the purchase price of which, in part, the note in suit was given? *Answer* (by the court, by consent of counsel). Yes.

2. In consideration for that transfer of said property to it, did the said Reif Lumber & Manufacturing Company promise and agree to and with the defendants to assume the payment of said note, and pay the same in the place and stead of the said defendants? *Answer* (by the court, by consent of counsel). Yes.

3. At any time before said Reif Lumber & Manufacturing Company made a voluntary assignment for the benefit of its creditors, on May 19, 1897, was it agreed and understood by and between the plaintiff, on the one part, and the defendants and the Reif Lumber & Manufacturing Company, on the other part, that the plaintiff accepted the latter company as maker and payor of said note, instead of said defendants, and that they were wholly released from liability thereon? *Answer* (by the jury). Yes.

4. If your answer to the third question be 'No,' then do not answer this question; but if your answer to the third ques-

tion be 'Yes,' then answer this question: Was the payment of $442.42, which is indorsed on said note under date of January 14, 1897, made thereon by said Reif Lumber & Manufacturing Company pursuant to the agreement referred to in the third question, and as the maker of said note, and so accepted by the plaintiff? *Answer.* Yes (by the jury).

5. If your answer to the third question be 'No,' then do not answer this question; but, if your answer to the third question be 'Yes,' then answer this question: Was the payment of $572.80, which is indorsed on said note under date of April 27, 1898, and which was paid thereon as a dividend by the assignee in said voluntary assignment, made pursuant to the agreement referred to in the third question, and so accepted by the plaintiff? *Answer.* Yes (by the jury).

6. In the matter of the assignment of the said Reif Lumber & Manufacturing Company, insolvent, did the plaintiff file with the assignee their proof of claim as a creditor of the former company, based upon said note, and stating in such claim that said insolvent company was the maker of said note, and, as such maker, was liable to plaintiff thereon? *Answer* (by the court). Yes.

7. Upon the claim so filed, did said assignee pay to plaintiff, as a creditor of the insolvent Reif Lumber & Manufacturing Company, the sum of $572.80, which is indorsed on said note under date of April 27, 1898? *Answer* (by the court). Yes.

8. Did the Reif Lumber & Manufacturing Company at any time indorse said note? *Answer* (by the court). No.

9. Did said Reif Lumber & Manufacturing Company, or its assignee, in its voluntary assignment, at any time make any payment on said note as an indorser thereof? *Answer.* (by the court). No.

10. Under and pursuant to the written agreement made by plaintiff and said Reif Lumber & Manufacturing Company on February 26, 1897, did the company then offer, in good faith, and being then ready and able so to do, to deliver to plaintiff, and to load on the cars, all lumber which was then in the lumber yard of said Reif Lumber & Manufacturing Company, and which plaintiff's agent and representative, then on the ground, should point out and select, to be taken in payment of said note? *Answer.* Yes (by the jury).

11. If you should find that such offer was made, then state whether or not the same was in compliance with the terms of said agreement of February 26, 1897. *Answer.* Yes (by the jury).

12. If you find that such offer was made, then state whether the value of the lumber so offered to the plaintiff under said agreement of February 26, 1897, was sufficient to pay the balance then unpaid on said note? *Answer.* Yes (by the jury).

13. What is the amount owing and unpaid on this note at this date,—January 22, 1901? *Answer* (by the court, by consent of counsel). $2,873.35.

14. If you find that the offer referred to in the tenth question was made, then state whether the plaintiff failed and neglected to take the lumber so offered. *Answer.* Yes (by the jury).

15. If said offer was made, could the plaintiff, by the exercise of reasonable diligence, have received and taken the lumber so offered, before said voluntary assignment was made, on May 19, 1897? *Answer.* Yes (by the jury).

16. Did said Reif Lumber & Manufacturing Company at any time write its name on the back of said note, or authorize any person to do so? *Answer* (by the court, by consent of counsel). No."

Upon this verdict, judgment for the defendants was rendered, and the plaintiff appeals.

For the appellant there was a brief by *Sedgwick, Sedgwick & Schmidt,* and oral argument by *G. G. Sedgwick.*

For the respondents the cause was submitted on the brief of *Baensch & Cloupek.*

WINSLOW, J. The plaintiff seasonably objected to the admission of any evidence under the answer for the reason that it states no defense, and the correctness of the ruling upon that objection is the first question for consideration. The answer is set forth at length in the statement of the case. It is sufficient here to say that it alleges, in effect, (1) that prior to the giving of the note in suit the defendants, to the knowl-

edge of plaintiff, had agreed to form a corporation for manufacturing lumber, and that on the 20th of September, 1895, they purchased of the plaintiff a sawmill on behalf of the projected corporation, and gave the note in suit, with the understanding that they were signing a note for the corporation, and that plaintiff received it with that understanding; (2) that the corporation was formed shortly afterwards, and engaged in manufacturing lumber in the mill, and, before maturity of the note, offered to pay the note in lumber, but that plaintiff declined to receive such lumber; (3) that the note was always considered a liability of the corporation by both plaintiff and defendants, and that in February, 1897, plaintiff made a written agreement with said corporation to take sufficient lumber to pay the note, which lumber the corporation was ready and willing to deliver, but that plaintiff neglected to take such lumber, and that in April following the corporation made a voluntary assignment; (4) that the plaintiff filed a verified claim with the assignee for the amount due on the note, treating the corporation as the maker thereof, and received a payment thereon from the assignee.

The question presented is whether these allegations state any defense. The note in suit, the execution of which is admitted, is a simple promissory note, signed by individuals, in the usual form, except that it contains an option allowing payment to be made in lumber at going rates. It is a plain, unambiguous, and complete document, (when construed with the accompanying agreement), which leaves nothing for explanation. It contains no doubtful or elliptical expressions, justifying the introduction of proof of surrounding facts and circumstances in order to comprehend its meaning. There is nothing uncertain, nothing to explain. The first part of the answer seems to be formed upon the idea that the legal effect of this plain and unambiguous personal obligation can be changed so that it will become an obligation of a corporation not then in being, by proof that all the parties knew at the

time that a corporation was to be formed to operate the mill, and that there was an oral understanding that it was to be considered to be the note of such corporation, and not of the individuals who signed it. No mutual mistake is alleged, nor is there any attempt to state an equitable counterclaim for reformation of the written agreement; but the bald proposition seems to be that the effect of a plain and unambiguous written agreement may be changed by proof of an oral mental understanding of the parties, so that it shall mean something entirely different. We shall spend no time in showing that such evidence is inadmissible for any purpose under the pleading. The principle which forbids its admission is as old as the law itself, and is not open to discussion. It is therefore plain that this part of the answer states no defense.

As to the remaining allegations of the answer, it seems quite doubtful upon what theory they were framed, or what defense they were supposed by the pleader to state. Apparently, it was thought that they might be construed to state either an agreement of novation of debtors, or an agreement of assumption of the debt by the corporation, to the knowledge of the plaintiff, by which the defendants became sureties only therefor, and were released by negligent failure of the plaintiff to collect the debt of the new principal. Certainly it cannot be argued that any other defense is stated, or even suggested, by this part of the answer. The theory that a novation of debtors is stated must at once be rejected. Novation of debtors means the substitution of one debtor for another. It can only take place by mutual agreement, to which the creditor, the old debtor, and the new debtor assent, and by which the old obligation is extinguished, and a new and valid obligation is created, and takes the place of the old one. *Lynch v. Austin,* 51 Wis. 287, 8 N. W. 129; *Spycher v. Werner,* 74 Wis. 456, 43 N. W. 161; *Lane v. Magdeburg,* 81 Wis. 344, 51 N. W. 562. While it is alleged in the answer that the new corporation agreed to pay the note, it is nowhere

alleged that such agreement was based upon any consideration, so as to be binding on the corporation; nor is it alleged that the plaintiff ever assented to any discharge of the obligation of the defendants.

It seems equally plain that the remaining supposed defense, namely, that the defendants had become sureties, and were discharged by neglect of the creditor to collect of the new principal when such collection could have been easily made, is not stated by the answer. If the new corporation purchased the mill of the defendants, and, as part of the consideration therefor, agreed to pay the debt to the plaintiff, it is probably true that the defendants thereby became, as between themselves and the corporation, surety only for the payment of the debt; and it may also be true that, in case the fact of such assumption was known to the plaintiff, it would owe to the defendants the duty of having no dealing with the new principal which would jeopardize the surety's position. *Gates v. Hughes,* 44 Wis. 332; *Bank v. Johnson,* 111 Wis. 372, 87 N. W. 237. Conceding all this to be true, however, there are fatal deficiencies in the answer, in failing to state that the corporation ever assumed to pay the debt for a consideration of any kind, and also in failing to state that the plaintiff was ever informed that such an agreement had been made. In the absence of these facts, the plaintiff owed the defendants no duty even to attempt to collect its debt of the corporation, because, as to the plaintiff, the defendants were still principals, and bound to pay the debt at all hazards.

Neither the fact that the corporation agreed with plaintiff to discharge the note in lumber, nor the fact that the plaintiff presented a claim in the assignment proceedings, operates to relieve the defendants of liability. The plaintiff was entitled to get its pay from any one who was willing to pay, and its efforts to that end, in the absence of knowledge of the assumption of the debt, for a consideration, by the corporation, did not prejudice its rights against the original debtors.

The inevitable conclusion is that the answer states no defense, and that the objection to the reception of any evidence under it should have been sustained. The objection having been overruled, however, and evidence having been received under the answer, it is necessary to consider in what respect the situation was changed by the evidence. In one important respect the defendants' position is improved by the evidence. It was shown to be a fact that on the 30th day of December, 1895, the defendants transferred the sawmill and machinery, which they had bought of the plaintiff, to the new corporation, and the corporation assumed and agreed to pay the note here in suit. As to the other essential fact, namely, knowledge on the part of the plaintiff of the assumption, the case is as bare of evidence as the answer is of allegation. The burden of proof of such fact is, of course, upon the defendants. No witness testified that the fact was ever communicated to any of the plaintiff's officers. On the other hand, the defendant *Anton Reif,* the president and general manager of the corporation, testifies that he has no recollection of ever writing the plaintiff anything about the relations between the defendants and the new corporation. The executive officers of the plaintiff testify positively that they never had any knowledge of any agreement of assumption, and never consented to make, nor were asked to make, any substitution of debtors. It is true that there was considerable correspondence carried on by the plaintiff with the Reif Lumber & Manufacturing Company (which was the name of the new corporation) as to the payment of the note; and it is also true the plaintiff's officers knew that some organization under this name was operating the mill, and that in February, 1897, the plaintiff agreed to accept lumber from this organization in discharge of the balance due. It is also true that the plaintiff proved the note as a claim against the corporation in the assignment proceedings. These facts seem to be relied upon as showing knowledge of the assumption of the debt by the cor-

poration. They are quite reasonably explained, however, by the plaintiff's officers, as simply resulting from the fact that the concern styling itself as the Reif Lumber & Manufacturing Company was running the business, and was willing to discharge the debt, and that the plaintiff was perfectly willing that they should do so. None of the facts are necessarily inconsistent with entire ignorance of the situation of the contract relations between the defendants and the company or association so styled. While these facts may have some tendency to prove knowledge of the fact of the assumption, they are entirely insufficient to justify a verdict to that effect, when standing alone, and met by absolute denials by the officers of the plaintiff of any such knowledge. The findings of the jury, therefore, which find that such knowledge in fact existed, and that there was an agreement for substitution of debtors, were not sustained by the evidence, and should have been set aside.

While the exceptions reserved upon the trial and urged in this court were very numerous, and have not been treated in detail, it is believed that the foregoing general remarks are entirely sufficient to cover all the material questions presented on the appeal.

By the Court.—Judgment reversed and action remanded for a new trial.

REYNOLDS, Appellant, vs. NIELSON, Respondent.

January 13—February 3, 1903.

Shipping: Vessels: Partition: Federal courts: Jurisdiction: Admiralty: Equity.

1. Sec. 563, R. S. of U. S., provides that the federal district courts shall have exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." *Held*, that the jurisdiction of federal courts

over the rights of part owners in vessels on the great lakes is not exclusive, and that a suit to partition such a vessel between tenants in common is maintainable in the courts of Wisconsin.

2. The fact that the admiralty courts have no admiralty or maritime jurisdiction to compel partition of a vessel, where there is a majority owner, does not affect the jurisdiction of state courts to afford such relief.

APPEAL from a judgment of the circuit court for Manitowoc county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action for partition of a vessel licensed and registered under the navigation laws of the United States, and used upon the waters of Lake Michigan. Plaintiff and defendant owned the vessel in unequal shares, the former being the owner of one-third and the latter of two-thirds. Defendant pleaded, among other things, want of jurisdiction of the subject of the action in that the rights of the parties were cognizable only in the federal court under its admiralty and maritime jurisdiction. The findings of fact were to the effect that the vessel was owned as and was of the character claimed in the pleading; that it was at Manitowoc, Wisconsin, at the time of the commencement of the action; that defendant, as majority owner, insisted upon controlling it without consulting plaintiff; that he had refused to unite with plaintiff in terminating the common ownership by a purchase or sale; that he had never denied to plaintiff an inspection of the accounts showing the income and expenses of operating the vessel or neglected to pay him his proper share of the net earnings; that the property at the time of the commencement of the action was free from all liens, and that, so far as this case is governed by secs. 2327*a*, 2327*c*, and 4257, Stats. 1898, plaintiff complied therewith before it was commenced.

On such findings the court decided as matter of law that it was without jurisdiction because the rights of the parties were governed by the maritime laws of the United States. Judgment was rendered accordingly.

The cause was submitted for the appellant on the brief of *J. E. Wildish,* and for the respondent on that of *M. C. Krause.*

MARSHALL, J. The judgment is wrong and must be reversed. A vessel is personal property and the rights of the owners therein are proper subjects for consideration in the state courts in cases where the jurisdiction of the federal court in the exercise of its admiralty and maritime powers is not exclusive. When a subject is within admiralty and maritime jurisdiction, such jurisdiction is not necessarily exclusive, as is plainly indicated by the federal law. Sec. 563, R. S. of U. S. It provides that district courts have exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, *saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it.* From that it will be seen that, to justify the decision here, the case must be a civil cause of admiralty and maritime jurisdiction, and it must be one for which there is no remedy in the state courts. The fact is that it is neither. This court has several times held that, in cases within maritime and admiralty jurisdiction, the state court has jurisdiction concurrent with that of the federal courts in administering the remedies afforded by its laws. *Horn v. Schooner Trial,* 22 Wis. 529; *Thorsen v. Schooner J. B. Martin,* 26 Wis. 488; *Warehouse & Builders' Supply Co. v. Galvin,* 96 Wis. 523, 71 N. W. 804.

There is no need here to define the precise limits of the term "civil causes of admiralty and maritime jurisdiction." Suffice it to say that it does not include any where the primary object in view is to obtain a partition of vessel property, nor any where partition between common owners of a vessel can be enforced, there being a majority ownership as in this case. As regards mere control of a vessel by maritime law, the majority interest is supreme, subject to such restraints by the

federal court as may be necessary to protect the minority owner in his rights to have the vessel employed reasonably, to have it preserved, and to enjoy his share of the net earnings. Story, Partn. §§ 437—439; *The Seneca,* 18 Am. Jur. 486, Fed. Cas. No. 12,670; *The Orleans v. Phoebus,* 11 Pet. 183; *Andrews v. Betts,* 8 Hun, 322.

Counsel for respondent seem to suppose, and we apprehend the trial court was guided by the same idea, that since the federal court, in the exercise of admiralty and maritime jurisdiction, cannot under any circumstances properly compel the sale of a vessel and a division of the proceeds where there is a majority owner, the state court cannot, overlooking, it seems, that such circumstance suggests jurisdiction in such cases by the state court instead of want of jurisdiction. If the federal court has jurisdiction of a matter pertaining to a vessel, subject to the navigation laws of the United States, because the same is within the scope of its admiralty and maritime powers, inquiry must be made as to whether such jurisdiction is exclusive before the matter is deemed to be outside the jurisdiction of the state court. If there is no federal jurisdiction, obviously, that fact alone does not militate against there being state jurisdiction. A vessel is personal property. A judicial sale thereof and division of its equivalent in money, where partition cannot otherwise be had, and there is good ground in equity for one of two or more common owners to seek such relief, is a proper subject for the exercise of equity jurisdiction by the rules of the common law. In fact, only a court of equity, by the common law, can deal with such matters. Its jurisdiction in that regard is very ancient and is founded solely on want of any remedy at law. Knapp, Partn. 492; Freeman, Co-Ten. & Partn. § 426; *Conover v. Earl,* 26 Iowa, 167; *Fobes v. Shattuck,* 22 Barb. 568; *Swain v. Knapp,* 32 Minn. 431, 21 N. W. 414. Under the chancery rule mere desire of a part owner of personal property to terminate the common ownership is not sufficient to put judicial machinery

in motion. That has been changed here by statute. Secs. 2327*a*, 2327*b*, 2327*c*, Stats. 1898. Now any person owning personal property in common with another or others may at his election have a partition thereof in specie where that can reasonably be effected, or in the equivalent in the form of money where that is necessary because division in no other way can be accomplished at all or without injury to the interests of the parties. All of the provisions of law relating to complaints in actions for the partition of real estate, so far as applicable, are made to include partition of personal property. Sec. 2327*a*, Id.

It would seem from what has been said that on principle the circuit court had jurisdiction of the subject of this action. But few similar cases are reported in the books. That may be because seldom has the power of the state court in such matters been questioned. *Andrews v. Betts*, 8 Hun, 322, is directly in point. It was there held that proceedings for the partition of personal property can be had in equity and nowhere else, and that vessels are no exception to that rule. That case is recognized by text-writers as laying down the law correctly. Knapp, Partition, 491. The text there is as follows:

"The court of equity has jurisdiction over an action, brought to secure a partition of personal property between tenants in common thereof. It matters not whether such property is a vessel to be used upon the high sea, or other personal property, so long as there is a co-tenancy and a failure to agree upon the part of the co-tenants, a court of equity has jurisdiction over the partition of the property, or a sale thereof and a division of the proceeds. Such court is competent to give relief in such cases by making the decree in partition, as the circumstances of the case or facts may warrant, or decree a sale, where the partition of such property cannot be had."

We indorse that. It is a mere statement of the common law. It is re-enforced by our statutes above cited. The circuit court, on the facts of this case, should have granted the

prayer of the complaint that the property be sold and the proceeds divided according to the interests of the parties, and should have, by the decree, directed some appropriate method of making such granted relief effective.

By the Court.—The judgment of the circuit court is reversed and the cause remanded for judgment in accordance with this opinion.

BRUSKE, Respondent, vs. NEUGENT, Appellant.

January 13—February 3, 1903.

Assault and battery: Precise date of offense: Instructions to jury: Evidence: Credibility of defendant: Damages.

1. In an action for assault and battery the plaintiff made no pretense in her testimony of an assault on more than one occasion, and fixed that occasion with absolute positiveness on a certain day. The defense, besides direct contradiction of any assault, consisted of evidence tending to prove an *alibi* on the day specified. *Held*, that it was not error to give to the jury an instruction, in substance, that it was not essential that the evidence show that the acts complained of were committed on the day alleged; that if the evidence satisfied the jury that the act was committed at or about that day, and it was the very act described in the complaint, then it did not defeat the action if the date alleged in the complaint was not the precise day on which the specified act was committed. *Taylor v. Young*, 61 Wis. 314, 21 N. W. 408, followed.
2. In such case, the court gave an instruction, in substance, that, if the jury believed the defendant's testimony that he committed no assault, they must render a verdict in his favor. The jury were also instructed to consider and weigh the evidence and credibility of each witness who had testified in the case. *Held*, that the instruction was not so framed as to lead the jury to think they were merely to compare the plaintiff's testimony with defendant's testimony, and to exclude from their consideration all other testimony.
3. In an action for assault and battery, in attempting undue familiarity with plaintiff and subjecting her to immoral solicitation, a verdict of $500 is not excessive although the physical and pecuniary injury may be insignificant.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action for assault and battery in attempting undue familiarities with the plaintiff, and subjecting her to immoral solicitation. The plaintiff, in her testimony, made no pretense of more than one occasion when anything of the sort took place, and fixed the occasion with absolute positiveness on Saturday, June 22, 1901. The defense, besides direct contradiction of any such event, consisted in evidence tending to prove an *alibi* on the 22d of June; such evidence, however, leaving at least a possibility of the presence of the defendant at the plaintiff's house at about the hour fixed by her for the acts complained of. The court charged the jury, among other things, over appellant's exception, to the following effect:

"But it is not essential to the maintenance of this action that the evidence shall show that the acts complained of were committed on June 22, 1901. If the evidence satisfies you that the acts were committed at or about that time, and if they were the very acts described in the complaint, then it does not defeat the plaintiff's action if the date alleged in the complaint is not the precise date on which the alleged acts were actually committed, and if the specified date is a mistake."

Upon a general verdict for $500, judgment was rendered in favor of plaintiff for that sum, from which the defendant appeals.

Simon Gillen, for the appellant.

M. C. Mead, for the respondent.

DODGE, J. 1. The first error assigned is the giving of the instruction quoted in the statement of facts; it being contended that such an instruction is misleading, where the plaintiff's evidence is confined to a definite event at a definite time, because of a tendency to lead the jury to believe that they may go outside of the evidence, and, although they do

not believe that the assault was committed on the day named, nevertheless may find such assault was committed at some other time. Confessing that there is much force to this argument, and that, if the question were a new one, we might incline to adopt it, still we feel constrained to adhere to the views expressed in *Taylor v. Young,* 61 Wis. 314, 21 N. W. 408, which has now stood for many years with no intimation of criticism. That case fully supports the application of the rule of law contained in the instruction to the situation presented in this case, and upon its authority we hold that no error was thereby committed.

2. Some complaint is made that certain instructions were so framed as to lead the jury to think that they were merely to compare the plaintiff's testimony with the defendant's as to whether the assault was in fact committed, and to exclude from their consideration all other testimony, some of which tended to show indefiniteness of memory in the plaintiff, or even wilful falsification by her, and other of which tended, as has been already said, to establish an *alibi.* We do not think the portions of the charge mentioned subject to this criticism. While the jury were told that, if they believed the defendant's testimony that he committed no assault, they must, of course, render a verdict in his favor, there was in this no suggestion that his was the only evidence tending to that result; and they were also instructed to consider and weigh the evidence and credibility of each witness who had testified in the case. We think that the whole charge fairly submitted to the jury for consideration the relative weight of all the evidence tending for or against either party, and are unable to say that any error prejudicial to the defendant appears therein.

3. The verdict is assailed as excessive in amount. With this contention we cannot agree. The mere physical or pecuniary injury was, of course, insignificant; but the outrage to the feelings of a modest and chaste woman, resulting

from the immoral solicitation which she testifies accompanied the assault, is such that we cannot feel justified in deeming an allowance of $500 so grossly excessive as to warrant this court in interfering. *Hacker v. Heiney,* 111 Wis. 313, 317, 87 N. W. 249.

By the Court.—Judgment affirmed.

WATTAWA, Respondent, vs. JAHNKE, Appellant.

January 13—February 3, 1903.

Appeal from justice's court: Notice of appeal: Affidavit: Sufficiency: Jurisdiction.

1. Sec. 3754, Stats. 1898, provides that, on appeal from a judgment of a justice of the peace, there shall be presented "to the justice before whom the action was tried, or his successor in office, or any other justice having custody of the docket containing such judgment" a notice of appeal, together with an affidavit that the appeal is in good faith. The defeated party in an action in justice's court presented to the justice a notice giving the name of the court, the formal title containing the names of the respective parties, the date and amount of the judgment and designation of the party taking the appeal. The required affidavit was not entitled, but was immediately below and upon the same side of the same sheet of paper as the notice of appeal, and stated it was made on behalf of "the defendant in the above entitled" and that "the appeal mentioned in the foregoing notice is made in good faith," etc. *Held,* that the affidavit showed on its face that it was made in the same action and referred to the same judgment as was mentioned in the notice of appeal, and came within the rule that an appeal from a judgment of a justice of the peace being purely statutory, the statute must be substantially complied with in order to give the appellate court jurisdiction.
2. Sec. 3763, Stats. 1898, provides that when an appeal is taken from a judgment of a justice of the peace, the justice shall "make return to the appellate court of the testimony, proceedings and judgment and file the same therein." On an appeal from a justice's judgment, neither the notice nor the affidavit gave the

name of the particular justice before whom the judgment was rendered, but the copy of the docket entries appearing in the record, and immediately following the notice and affidavit, recited that the appellant, naming the party subscribing the notice of appeal, "made and presented to me, the undersigned justice, a notice of appeal, affidavit of good faith, and undertaking in the above entitled action." *Held*, that the appeal papers complied with the statute and were sufficient to give the circuit court jurisdiction.

APPEAL from an order of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This is an appeal from an order entered in the circuit court October 28, 1901, dismissing an appeal from a judgment rendered by a justice of the peace on the ground that the appeal papers were insufficient to give the circuit court jurisdiction. The notice of appeal to the circuit court is as follows:

"State of Wisconsin, Kewaunee County:
"In Justice Court.
"*John Wattawa,* Plaintiff,
vs.
"*Fred Jahnke,* Defendant.
"Take notice that the defendant above named appeals from the judgment rendered in said court before you in the above entitled action on the 5th day of June, 1901, in favor of the plaintiff and against the defendant, for the sum of $120.64 damages and $19.78 costs, to the circuit court of Kewaunee county.
"Dated June 5th, 1901.
"FRED JAHNKE, Defendant,
"By A. L. SCHMITZ, One of His Atty's."

Immediately following such notice, and on the same side of the same sheet, is an affidavit, of which the following is a copy:

"State of Wisconsin, County of Kewaunee—ss.:
"A. L. Schmitz, being first duly sworn, on oath says that he is one of the attorneys for *Fred Jahnke,* the defendant *in the above entitled,* and makes this affidavit in his behalf; that

the appeal mentioned in the foregoing notice is made in good faith, and not for the purpose of delay.

"A. L. SCHMITZ."

"Subscribed and sworn to before me this 6th day of June, 1901.

"W. SEIDL,
"Justice of the Peace, Kewaunee Co., Wis."

That is followed by an undertaking executed by the defendant and another at the same time, to which no objection is taken. And the undertaking is followed by a copy of the record of the docket entries made by the justice of the peace, as shown by the transcript returned to the circuit court, as follows:

"June 6th, 1901. *Fred Jahnke,* the defendant and appellant, made *and presented to me,* the undersigned justice, notice of appeal, affidavit of good faith, and undertaking, in above-entitled action. Same received, approved, and filed,—and also paid $9.16, my fee; $1.00, return; $2.00, clerk fee; and $1.00, state tax.

"W. SEIDL,
"Justice of the Peace."

Each and all of such papers were filed with the clerk of the circuit court June 6, 1901.

The cause was submitted for the appellant on a brief signed by *A. L. Schmitz* and *O. H. Bruemmer,* and a separate brief by *O. H. Bruemmer,* attorney, and *Geo. W. Wing,* of counsel, and for the respondent on the brief of *Nash & Nash,* of counsel.

CASSODAY, C. J. Counsel for the plaintiff is undoubtedly correct in claiming that the right of appeal from a justice of the peace is purely statutory, and that the statutes must be substantially complied with, in order to give the circuit court jurisdiction. But we are clearly of the opinion that the appeal papers in question substantially comply with the statute (sec. 3754, Stats. 1898). The notice gives the name of the court, the names of the respective parties, the date and amount

of the judgment, and the party taking the appeal. True, the affidavit of good faith on behalf of the defendant is not entitled; but it is immediately below the notice of appeal, and upon the same side of the same sheet of paper, and states that it is on behalf of "the defendant in the above entitled," and that "the appeal mentioned in the foregoing notice is made in good faith, and not for the purpose of delay," and hence shows that it was made in the same action and refers to the same judgment as is mentioned in the notice. True, there may be several justices of the peace in Kewaunee county, and neither the notice nor the affidavit gives the name of the particular justice before whom the judgment was rendered; but such justice recited in his docket entries in the case that "*Fred Jahnke* [the defendant and appellant] made and presented to me, the undersigned justice, notice of appeal, affidavit of good faith, and undertaking in the above-entitled action." The appeal papers appear to be a substantial compliance with the statute cited, and hence sufficient to give the circuit court jurisdiction. The following are a few of the adjudications in support of such ruling: *Kearney v. Andrews,* 5 Wis. 23; *Bremer v. Koenig,* 5 Wis. 156; *Evangelical L. St. P. Gemeinde v. Koehler,* 59 Wis. 650, 18 N. W. 476; *Noall v. Halonen,* 84 Wis. 402, 54 N. W. 729; *Hender v. Ring,* 90 Wis. 358, 63 N. W. 282; *Neppach v. Jordan,* 13 Oreg. 246, 10 Pac. 341; *Lancaster v. McDonald,* 14 Oreg. 264, 12 Pac. 374.

By the Court.—The order of the circuit court dismissing the appeal is reversed, and the cause is remanded for further proceedings according to law.

KELSO, Appellant, vs. KUEHL, Respondent.

January 13—February 3, 1903.

Slander: Evidence: Verdict: Appeal and error: Jurors: Qualifications.

1. Where, in an action for slander, the speaking of the slanderous words is denied by the defendant, and by one other witness present when the alleged slander was uttered, the jury is justified in finding a verdict for the defendant.
2. A juror on his *voir dire* testified that he knew the parties, was not related to them, had not heard about the case, and could decide the case on the evidence without regard to who the lawyers were. *Held*, that the fact that the juror was the husband of the first cousin of one of the defendant's attorneys,—a fact which was not known to plaintiff or his counsel until after the rendition of the verdict,—did not disqualify him from acting as a juror, and is not ground for reversal of the judgment.

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

The cause was submitted for the appellant on the brief of *John Wattawa,* and for the respondent on that of *O. H. Bruemmer.*

WINSLOW, J. This is an action for slander, which was tried before a jury, and resulted in a verdict for the defendant. A motion for a new trial was made on two grounds: (1) Because the verdict is contrary to the evidence; and (2) because one of the jurors was the husband of the first cousin of one of the defendant's attorneys,—a fact which was not known to plaintiff or his counsel until after the rendition of the verdict. The motion was overruled, and judgment rendered for the defendant, from which plaintiff appeals.

The judgment must be affirmed. Careful reading of the evidence shows that there was sufficient evidence in the case from which the jury were justified in finding a verdict for the defendant. The speaking of the alleged slanderous words

was absolutely denied by the defendant, and by one other witness who was present at the conversation in which the slander is charged to have been uttered. As to the alleged disqualification of the juror, it appears that on his *voir dire* he testified that he knew the parties, was not related to them, had not heard about the case, and could decide the case on the evidence, without regard to who the lawyers were. He was not asked whether he was related to the attorneys. There was therefore no deception of any kind practiced. The fact that he had married a relative of one of the counsel did not disqualify him from acting as a juror. This is well-settled law. "Consanguinity or affinity which will afford a ground for challenge for principal cause must exist between the juror and a party to the suit." It is not enough that there be affinity between the juror and counsel. Thomp. & M. Juries, § 178; *People v. Waller* (Mich.), 38 N. W. 261.

By the Court.—Judgment affirmed.

GARVIN, Appellant, vs. CROWLEY, imp., Respondent.

January 13—February 3, 1903.

Appeal and error: Record: Attorney and client: Contract of employment: Rights of attorney: Stipulations: Discontinuance of action: Appeal and error: Material error: Practice.

1. Sec. 3050, Stats. 1898, requires, on appeal to the supreme court from an order, that the return identify the papers transmitted with those upon which the motion was heard, and certify that the transmitted papers are all of such papers, which may be done, either by recital in the order appealed from, or by the certificate of the clerk attached to the papers. Said section also requires, on appeal from a judgment, that the return contain the record (consisting of the judgment roll, and bill of exceptions, if any), and be accompanied by the certificate of the clerk that the papers transmitted are the originals or copies thereof,

and are transmitted pursuant to the appeal. Sec. 3070, Stats. 1898, provides that all intermediate orders involving the merits and necessarily affecting the judgment, and all orders appearing on the face of the record, may, on appeal from the judgment, be reviewed without any exceptions having been taken thereto. On a motion to dismiss an appeal it appeared that the appeal was from a judgment; that the notice of appeal was in the usual form and perfect in every respect; that the return contained the judgment roll, properly certified, and that the judgment, by appropriate recitals, referred to the papers and proceedings on which it was based, which were all transmitted. *Held*, that a motion to dismiss for insufficiency of the notice of appeal and return should be denied.

2. A defendant in an action on a promissory note contracted with his attorney that the latter should receive, as fees for defending the action, the costs taxable in favor of the defendant, if successful. Thereafter plaintiff's attorney, with knowledge of such arrangement, prepared a written stipulation for discontinuance of the action as to such defendant without costs, and, in the absence of defendant's attorney, procured defendant to sign it. Afterwards defendant moved to set aside the order entered thereon discontinuing the action as to him, alleging that he did not understand the effect of the paper, and that he was prevented from so doing by the wrongful conduct of plaintiff's attorney. It appeared that defendant was a man of ordinary common sense, could read and understand plain English words, and had ample opportunity to read the stipulation before he signed it. *Held*, that it was error to hold that the stipulation was obtained by fraud, and to set aside the judgment based thereon.

3. Where an attorney agreed to defend an action, and receive therefor the costs taxable to his client, if successful, such agreement does not give the attorney a lien, either legal or equitable in character, upon the mere right of his client to defend against plaintiff's cause of action, precluding the defendant from settling the litigation independently of his attorney.

4. After issue joined by defendant's answer, on stipulation signed by defendant, an order was entered discontinuing the action, as to him, without costs. Afterwards, on application to set aside such discontinuance, and for judgment dismissing the complaint as to such defendant, with costs, the court granted the motion. *Held*, that even if the motion to set aside the order discontinuing the action was proper, it was error to enter a judgment dismissing the action with costs against plaintiff without a trial of the issues raised by such answer.

5. In such case, judgment having been entered before the motion was made, on setting aside the order discontinuing the action, the appropriate relief to have been granted, if any, was a modification of such judgment so as to include a recovery for costs, or the granting of a motion dismissing the action as to defendant with motion costs in his favor, and not the entry of a second judgment.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This action was commenced against defendant *Crowley* and others to recover on a promissory note. A judgment was rendered against such others by default for the amount claimed. *Crowley* answered, claiming that what purported to be his signature was a forgery. Prior to the judgment mentioned, upon a stipulation signed by *Crowley* in person, in the absence of and without the knowledge of his attorney, an order was entered dismissing the action as to him without costs. Subsequently plaintiff was ordered to show cause before the court why such stipulation and order should not be set aside and a judgment be rendered in *Crowley's* favor dismissing the complaint as to him, with costs in his favor against the plaintiff. The order to show cause was based upon two affidavits, one by *Crowley* and the other by his attorney. *Crowley's* affidavit was to the effect that November 12, 1901, at plaintiff's request, he called on Charles D. Smith, plaintiff's attorney, at his office, and was there informed by such attorney that it was desired to release him from the note, and to effect that it was necessary for him to sign a paper there exhibited, the paper later to be presented to the circuit judge; that he asked for time to submit the paper to his attorney, but the request was refused, plaintiff's attorney assuring him that all proceedings were fair, and pressing him earnestly to sign the paper; that he finally complied with such request; that a contract then existed between him and his attorney entitling the latter to compensation for his services in the main by such costs as he might recover in defendants'

favor in the action; that he was made to believe by plaintiff's attorney that it was for his interest and that it was his duty to sign the paper; that he did not understand his rights in the matter, or the effect of the paper, or he would not have signed it; that the purpose of plaintiff and his attorney in obtaining defendant's signature to the paper was to cheat his attorney out of the compensation agreed upon for his services. The affidavit of his attorney, Mr. Doyle, was to the effect that under his contract to serve defendant in the case he was limited for compensation, in the main, to such costs as defendant might recover of plaintiff; that when the stipulation was signed plaintiff's attorney knew of such contract; that upon being informed of the stipulation, he, with his client, visited plaintiff's attorney, and requested such attorney to show him the stipulation, and was informed that it was on file; that such attorney imposed upon *Mr. Crowley* in obtaining the stipulation.

Upon the hearing of the order to show cause, two opposing affidavits were read. One of them was by plaintiff's attorney and was to the effect that *Crowley* signed the stipulation with full opportunity for knowing its contents and a full understanding of its import, and without either plaintiff or his attorney having any knowledge that the making of the stipulation would in any way violate any contract between *Crowley* and his attorney; that the latter asked for an opportunity to see the stipulation, and was informed that it was on file. The other affidavit was made by a person who was present at the time the stipulation was signed. It fully corroborated the affidavit made by appellant's attorney. The following is the language of the stipulation:

"It is hereby stipulated and agreed that an order may be entered in this action discontinuing the same against the defendant *John Crowley,* without costs to either party; and from all liability as indorser on the note in suit."

The court granted the motion. Judgment was rendered accordingly. It contained recitals referring to all the papers upon which the motion was heard, in such manner as to identify them. It also contained findings to the effect that the stipulation was fraudulently obtained with a design to prevent defendant's attorney from obtaining the compensation agreed upon between him and his client by means of a judgment for costs against the plaintiff, and that said defendant, on behalf of his attorney, was entitled to have the stipulation and the order based thereon set aside, and to have a judgment rendered against plaintiff in *Crowley's* favor dismissing the complaint as to him with costs. The costs were taxed and inserted in the judgment, the amount thereof being $32. Plaintiff appealed.

For the appellant the cause was submitted on the brief of *Charles D. Smith.*

T. L. Doyle, for the respondent.

MARSHALL, J. Respondent's counsel moved the court to dismiss the appeal for insufficiency of the notice of appeal and return to this court. We are unable to discover sufficient merit in the motion to warrant treating the matter at length. The notice of appeal is in the usual form and perfect in every respect. The return is likewise free from defects. Counsel seems to have confused decisions of this court on appeals from orders with those on appeals from judgments like this. Respecting the former, the return is required to identify the papers transmitted as those upon which the motion was heard, and to show that they are all of such papers, which may be done by the certificate of the clerk or the order appealed from. Sec. 3050, Stats. 1898; *Glover v. Wells & M. G. Co.* 93 Wis. 13, 66 N. W. 799; *Hoffman & Billings Mfg. Co. v. Burdick,* 95 Wis. 342, 70 N. W. 470; *Tenney v. Madison,* 99 Wis. 539, 75 N. W. 979; *Superior Consolidated L. Co. v. Superior,* 104 Wis. 463, 80 N. W. 739; *Ryan v. Philippi,* 108 Wis. 254, 83

N. W. 1103. As to the latter the statute requires the return to contain the record, which, when there is no bill of exceptions, consists of the judgment roll. Sec. 3050, Stats. 1898. In determining the appeal, all intermediate orders involving the merits and necessarily affecting the judgment, and all orders appearing upon the face of the record (the judgment roll), may be reviewed without any exceptions having been taken thereto. Sec. 3070, Id. The certificate of the clerk to the return is required to be to the effect that the papers transmitted are the originals or copies thereof, and are transmitted pursuant to the appeal. Sec. 3050, Id. The certificate of the clerk here substantially complies with that. It is annexed to the notice of appeal as the statute requires. It states that such papers are the originals and are all the papers that have been filed in the clerk's office, and are transmitted to the clerk of the supreme court "pursuant to the annexed notice." If the return were to be tested by the jurisdictional essentials of an appeal from an order, it would be sufficient, because the judgment, by appropriate recitals, refers to the papers and proceedings upon which it is based, and they were all transmitted. Testing it, as it must be, by the jurisdictional essentials of an appeal from a judgment, there is no defect, as the judgment roll is here with a proper certificate identifying it. Testing it as to whether the alleged errors appear on the face of the record, it is sufficient.

Coming down to the merits of the appeal, we are at a loss to understand upon what principle of law the court reached the conclusion that appellant's attorney obtained the stipulation by fraud, permitting discontinuance of the action without costs. We must assume that reference was made to something more than mere deception; that the learned judge supposed he discovered, in the proof submitted to him, facts constituting a violation of legal rights, accomplished by deception practiced upon the defendant without such fault upon his part as to preclude the court from granting him relief. In

that the court must have relied upon respondent's mere statement that he did not understand the stipulation and that he was prevented from doing so by the wrongful conduct of plaintiff's attorney. We are unable to see any legitimate foundation for that. It must be assumed, nothing appearing to the contrary, that respondent was a man of ordinary common sense, and could read and understand simple, plain English words. He had ample opportunity to read the stipulation, and there is enough in his affidavit to indicate that he did so. Certainly, there is nothing in the moving papers to indicate that he was dissuaded from doing so by appellant's attorney. The language of the stipulation could not reasonably convey any other meaning to a person of mature years and common understanding than that it cut off all opportunity of respondent to recover a judgment for costs; that it practically terminated his connection with and interest in the litigation. His statement that he did not understand its effect is not entitled to a moment's consideration, even if there were proof that the design of appellant's attorney was to obtain the stipulation without respondent's knowing its effect. The law on that subject is too plain to warrant taking time to discuss it. However, there is not a word in respondent's affidavit showing that the effect of the paper was misrepresented to him by plaintiff's attorney. The most that is claimed is that the latter said, in effect, that the paper operated to release respondent from all liability on the note and that it was fair, and that there was no necessity for him to exhibit the paper to his attorney. All that was true from a legal standpoint. Respondent had a legal right to sign the paper and drop out of the case without consulting his attorney. The latter had no right which the court could recognize, to prolong the litigation merely for the purpose of recovering a judgment for costs in his client's favor if such client desired to drop out of the case, regardless of his motive in the matter. If the court considered that it was a fraud upon respondent that could be

dealt with judicially, for appellant to secure a plainly worded stipulation from him in the absence of his attorney, merely because of such absence and the respondent's claim, without any reasonable ground to support it, that he did not understand the paper, was clearly wrong.

The finding that the stipulation was a fraud upon respondent's attorney because of his contract limiting his compensation in the action, in the main, to such costs as he might secure in respondent's favor against appellant, is not supported by the legal principle which we apprehend the circuit court supposed ruled the matter, namely, that an attorney in an action has such an interest in the cause of action or claim involved, there being an agreement between him and his client, known to the opposite party, entitling him to compensation for his services out of the amount recovered, that if a settlement be made between the parties for the purpose of preventing such attorney from enjoying the benefit of his contract, it may be set aside and the attorney permitted to prosecute the cause of action to the extent of recovering enough to compensate him for his services. *Courtney v. McGavock,* 23 Wis. 619. That applies only where there is a claim or cause of action upon which a recovery can be had independently of a mere judgment for costs. It has no reference whatever to a mere defense. The idea that an attorney can acquire a lien of either a legal or an equitable character upon the mere right of his client to defend against the claim or cause of action of the plaintiff, precluding the parties from settling the litigation independently of him, regardless of their motives therefor, is without support in principle or authority, so far as we are aware.

If it were not for what has been said the judgment would have to be reversed for the following reasons: (1) The furthest the court could properly have gone on the motion, even if the rule which the circuit judge had in mind applied to the case, was to have vacated the stipulation and order dis-

missing the action, leaving the case to stand against respondents as it was before the stipulation was made. To follow that without a trial of the issue raised by the answer to the complaint, by arbitrarily entering a judgment dismissing the complaint with costs against the plaintiff, was entirely wrong. (2) There having been one judgment entered in the action, a second judgment was improper. Except in situations provided for by section 2883, Stats. 1898, not including such a one as that before us, all the issues in every action must be closed by a single judgment. *Sellers v. Union L. Co.* 36 Wis. 398; *Scott v. Reese,* 38 Wis. 636; *Singer v. Heller,* 40 Wis. 544; *Treat v. Hiles,* 75 Wis. 265, 44 N. W. 1088; *Sherman v. Menominee R. L. Co.* 77 Wis. 23, 45 N. W. 1079; *Gage v. Allen,* 84 Wis. 330, 54 N. W. 627; *Trustees of St. Clara Female Academy v. Delaware Ins. Co.* 93 Wis. 57, 66 N. W. 1140; *Hyde v. German Nat. Bank,* 96 Wis. 406, 71 N. W. 659. The relief to which respondent would have been entitled, and the form of it, under any circumstances, in view of the fact that a judgment had been entered in the case, was a modification of such judgment so as to include a recovery by respondent for costs, or the granting of a motion dismissing the action as to him with motion costs in his favor.

By the Court.—The judgment of the circuit court is reversed.

SOMERVAILL and others, Respondents, vs. MCDERMOTT, Appellant.

January 13—February 3, 1903.

Equity: Jurisdiction: Accounting: Fraud: Pleading: Burden of proof: Cause of action: Survival: Joinder: Parties.

1. In an action brought against the confidential agent of plaintiffs' intestate, the complaint alleged, in substance, that through many years the defendant, as a fiduciary, and in a position of

special trust and confidence, acquired control of divers amounts of his principal's money, some known, some partly known, and some unknown, some from her, and some from others for her, all of which his duty required him to apply for her benefit; that he had made no accounting of his dealings with these moneys; that the facts in relation thereto were all within his knowledge, and many of them not within the knowledge of the plantiffs, nor, indeed, of the deceased principal. The prayer was that defendant be required to account, and pay to plaintiffs such sums as the accounting disclosed remained in his hands as such fiduciary. *Held*, that the complaint presented a case for equity jurisdiction.

2. In an action in equity against a fiduciary for an accounting, based on improper dealings with property held in such capacity, the burden of disclosure rests on the fiduciary, and the plaintiff is relieved from the original necessity of specifying and proving in detail the various breaches of trust. *Allen v. Frawley*, 106 Wis. 638, distinguished.

3. Sec. 4253, Stats. 1898, provides that, in addition to actions which survive at common law, actions for recovery of personal property, for the unlawful withholding or conversion thereof, and equitable actions to set aside conveyance of real estate, and to compel a reconveyance, shall also survive. Action was brought by an administrator, based on allegations that defendant, who had been the confidential agent of his intestate, had induced decedent to purchase land at excessive prices, to defendant's benefit, and that he had retained to his own use moneys collected belonging to decedent. The relief prayed was that such conveyances be declared fraudulent, and for an accounting. *Held*, that the cause of action alleged survived independent of sec. 4253.

4. In such action, the complaint considered and *held* to state a cause of action to recover defendant's gains upon implied contract or resulting trust, and not in tort for damages.

5. A cause of action in equity to obtain an accounting, and payment of the amount of money disclosed to be due, is none the less single because it involves numerous items of property for which defendant is sought to be charged, and items of money or property coming into his fiduciary control in different ways.

6. A complaint seeking rescission of certain conveyances of land, and return of the ostensible title to defendant, but seeking it only as a necessary adjunct to the main purpose of compelling him to account for what he wrongfully detains, presents a single cause of action.

7. Demurrer to a complaint for misjoinder of causes of action does not raise the question of misjoinder of parties plaintiff.
8. In equity the arrangement of parties is of little importance, and can be regulated by the court at any time, in its discretion.

APPEAL from an order of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Appeal from order overruling demurrer to the complaint, which asserts substantially the following facts: The defendant, for a number of years prior to her death, in 1897, was the trusted agent of Margaret Somervaill, who died at the age of about eighty, and for many years prior had been feeble, mentally and physically, and largely incapable of caring for her own affairs; that as such agent he committed various acts of breach of trust, to his own benefit, consisting in procuring the purchase by said Margaret of various parcels of real estate at grossly excessive prices, far above the true cost thereof to him, and thereby perverting to his own use large amounts of money in his hands as agent; also in using money of hers in his hands to pay taxes and other expenses upon such improperly purchased lands; also in that he received, and neglected to pay over, considerable sums of money from debtors of said Margaret. The amounts, in detail, of such transactions, were wholly within the knowledge and accounts of the defendant. The suit was brought by the administrator of Margaret Somervaill's estate, joining as plaintiffs all her heirs at law, several of whom are not *sui juris,* tendering rescission and return to the defendant of the legal title to all of said real estate so alleged to have been fraudulently purchased on her behalf by him, and prayed that such conveyances of real estate be declared fraudulent, and be set aside, and the title be reconveyed to the defendant; that the defendant be required to pay the specified sums received by him for said real estate, together with interest; and that he be required to account for all sums of money belonging to the deceased improperly retained in his hands as agent; and for

general relief. The demurrer was on two grounds: First, improper joinder of causes of action; second, failure to state facts sufficient to constitute a cause of action.

For the appellant the cause was submitted on the brief of *Edward S. Bragg.*

For the respondents there was a brief by *Swett & Ecke,* and oral argument by *H. E. Swett.*

DODGE, J. In meeting the grounds of the demurrer, the natural sequence of inquiries is: First, whether any cause of action cognizable in equity is stated; and, secondly, if any is stated, whether more than one appears not properly joinable with the other. In answering these inquiries, the complaint is entitled to liberal construction, to effectuate the apparent purpose of the pleader, and enable the doing of justice in the situation laid before the court. Sec. 2668, Stats. 1898; *Pfister v. Sentinel Co.* 108 Wis. 572, 581, 84 N. W. 887. Thus proceeding, one finds, as the general ground of complaint, sufficient allegation that through many years the defendant, as a fiduciary, and in a position of special trust and confidence, acquired control of many and divers amounts of his principal's money, some known, some partly known, and some unknown, some from her, and some from others for her, all of which his duty required him to apply to her benefit; that he has made no accounting of his dealings with these moneys, and that the facts in relation thereto are all within his knowledge, and many of them not within the knowledge of the plaintiff, nor, indeed, of the deceased principal. The court, in the exercise of its equity powers, is prayed to require of the defendant an accounting of his stewardship, and the payment to the administrator of such sums as the accounting shall disclose remaining in the hands of the fiduciary. In such situation, the ability and duty of equity courts to act has always been recognized. No sufficient remedy exists in the common-law right of plaintiff to

sue for the money due, burdened with the necessity of alleging and proving in the first instance both the fact and the amount of such indebtedness. Under such circumstances, the burden of disclosure should rest upon him who has enjoyed the trust and has the knowledge. *Lessel v. Zillmer,* 105 Wis. 334, 339, 81 N. W. 403. One of the weapons of a court of equity, namely, a command that he account, is appropriate and necessary to cast this burden upon the defendant. The judgment for payment of money, although also in the power of a law court, is, of course, appropriate to equity, in carrying out the policy of doing complete justice, when once its jurisdiction has attached. *Schwickerath v. Lohen,* 48 Wis. 599, 4 N. W. 805; *Merrill v. Merrill,* 53 Wis. 522, 10 N. W. 684; *Rippe v. Stogdill,* 61 Wis. 38, 20 N. W. 645. No sufficient answer to this right of a principal to compel an accounting by an agent is presented by appellant's argument that as to some of the items, properly a part of such account, the plaintiff might maintain action at law. This is true in all such cases, for each misapplication or misappropriation of his principal's money arouses a constructive contract to repay it, upon which an action at law in assumpsit may be predicated, but only with the burden of specific allegation and proof, from which the fiduciary relation entitles plaintiff to be exempt, as above stated. Such remedy is not so fully adequate as to deprive plaintiff of his right to bring the agent to an accounting of all his transactions with the fiduciary property or money in one action; thus relieving the former from the original necessity of specifying and proving in detail the various breaches of trust, as well as from a multiplicity of suits. In this respect the situation at bar differs entirely from that presented in *Allen v. Frawley,* 106 Wis. 638, 82 N. W. 593. There, there was no charge of improper dealing with property held in fiduciary capacity, and no multiplicity of transactions,—merely the single act of obtaining from plaintiff specific property by deceit; and we held

that action at law to recover the proceeds of that property was adequate remedy.

The contention that the cause of action above described does not survive is so completely refuted by the authorities as to hardly require discussion. *Allen v. Frawley, supra,* p. 642; *Killen v. Barnes,* 106 Wis. 546, 82 N. W. 536; *Cheney v. Gleason,* 125 Mass. 166; *Houghton v. Butler,* 166 Mass. 547, 44 N. E. 624. Whether it be viewed as an action to enforce a trust or to recover on implied contract, the cause of action survived at common law, and no support for such result is needed from sec. 4253, Stats. 1898. The cause of action arising from deceit and fraud, which did not survive at common law, and which we have held not to be given survival by that section, is the recovery in tort for the damages suffered by the plaintiff. *Farwell Co. v. Wolf,* 96 Wis. 10, 70 N. W. 289, 71 N. W. 109; *Lane v. Frawley,* 102 Wis. 373, 78 N. W. 593; *Allen v. Frawley, supra; Killen v. Barnes, supra.* The complaint at bar discloses no attempt to recover, in tort, plaintiff's damages, but only defendant's gains, upon implied contract or resulting trust.

2. Is there misjoinder of causes of action? From what has been said, it is apparent that we construe the complaint as stating a cause of action in equity to obtain an accounting, and payment of the amount of money such accounting shall disclose to be due to the estate of Margaret Somervaill, deceased. Such right of action is, of course, in the administrator only. It is none the less single because it involves numerous items of property for which defendant is sought to be charged, nor because different items of property or money came into his fiduciary control in different ways,—some from the plaintiff by fraud, and some, from others for her, innocently. His disposal of all these is sought to be investigated, and his net responsibility therefor ascertained and enforced. True, the complaint seeks rescission of certain conveyances of land, and return of the ostensible title to de-

fendant, but seeks it only as a necessary adjunct to the main purpose of compelling him to account for that which he wrongfully detains, ancillary and germane thereto. Such a complaint presents no misjoinder of causes of action. *Bassett v. Warner,* 23 Wis. 673; *Gager v. Marsden,* 101 Wis. 598, 77 N. W. 922; *Zinc Carbonate Co. v. First Nat. Bank,* 103 Wis. 125, 139, 79 N. W. 229; *Level L. Co. v. Sivyer,* 112 Wis. 442, 451, 88 N. W. 317. Much of appellant's argument on this branch of the case seems to flow from the presence of the heirs at law as plaintiffs. The relevancy of that circumstance to a demurrer on the ground of misjoinder of causes of action is not very apparent. Misjoinder of parties plaintiff is not raised thereby, unless, indeed, there be several causes of action in favor of different plaintiffs. Of that, as already stated, we find nothing. The one cause of action stated is in favor of the administrator. The presence of the heirs at law as parties to the action is rendered necessary merely because, to render possible the complete relief sought, the decree must divest them of the formal legal title to certain real estate. To this end, they, as well,—perhaps more properly,—might have been made defendants; but in equity the arrangement of parties is of little importance, and can be regulated by the court at any time, in its discretion. *Gager v. Marsden, supra.*

By the Court.—Order appealed from is affirmed.

MILLER, Respondent, vs. TOWN OF CASCO, Appellant.

January 14—February 3, 1903.

New trial: Discretion: Defective highways: Personal injuries: Negligence: Special verdict: Inconsistent answers.

1. An order granting a new trial, based solely on the legal conclusion that a special verdict is inconsistent and evasive, is not an order made in the exercise of the court's discretion.

2. In an action for personal injuries claimed to have been occasioned by a defective highway, plaintiff alleged that there was a hole in a bridge in the highway; that defendant's overseer of highways had placed sticks therein to warn travelers, and that her horse became frightened at the sticks, causing plaintiff to be thrown from her buggy and injured. A special verdict was rendered, in effect, that the highway was not defective; that the horse was ordinarily gentle; that it was, however, frightened by the sticks, and that the driver was not guilty of any contributory negligence. *Held*, that such verdict was not inconsistent or evasive, but was consistent with a finding that the injury was the result of pure accident, without negligence.
3. In such case, the jury having found that the highway in question was not defective, an affirmative answer to a question whether the town officers should have known of the existence of the hole, and repaired it, so as to make the road safe, before plaintiff's injury, "if it was not then repaired so as to be safe," does not render the verdict inconsistent, since the jury simply found that, upon the supposition that the highway was not safe when plaintiff was injured, then it should have been repaired.
4. Where a jury upon sufficient testimony have found that an occurrence was a pure accident, without negligence on either side, the defendant is entitled to judgment.

APPEAL from an order of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

This is an action to recover damages for injuries suffered by the plaintiff by reason of being thrown from her buggy while riding upon a highway in the defendant town on the last day of September, 1900. The plaintiff's claim is that the highway was defective by reason of a hole at one end of a small bridge or culvert in the road in which the overseer of highways had placed certain sticks or pieces of wood to warn travelers of the defect, and at which sticks the plaintiff's horse became frightened, and swerved to the other side of the road, throwing her out of the buggy, and injuring her. The horse was driven by the plaintiff's son, a boy seventeen years of age. The jury returned the following special verdict:

"First question: On the 1st day of September, 1900, while the plaintiff, *Veronika Miller,* was riding in a buggy over the

public highway in the town of *Casco,* in said county, at the place particularly described in the complaint, did the left hind wheel of the buggy run off from the west end of the bridge, and cause plaintiff to be violently thrown from the buggy to the ground, and to be thereby injured? Answer. Yes. Second question: At the junction of said bridge with the approach thereto, was there a hole within the roadbed in that approach, and extending into the traveled track on the east side thereof at the time of the plaintiff's injury? Answered by the court, by consent of counsel, Yes. Third question: On the day when plaintiff sustained her injury, and before it occurred, did Anton Ouradnik, the overseer of highways in the road district which there included the place where plaintiff was injured, put a number of sticks or pieces of wood into said holes for the purpose of temporary repairs? Answer by the court, by consent of counsel, Yes. Fourth question: By reason of said hole, and with the sticks so placed therein by the overseer, was the highway at that point so insufficient in repair, when plaintiff was injured, that the natural and probable consequence of its appearance and condition would be to frighten horses of ordinary gentleness when passing said point? No. Fifth question: Were there any railings or guards placed on said bridge when it was built, or at any time thereafter, and prior to the time of plaintiff's injury? Answer by the court, by consent of counsel, No. Sixth question: Did the absence of guards or railings at the time of the injury render the bridge unsafe, and dangerous for public travel thereon by means of vehicles drawn by horses? Answer. No. Seventh question: At the time of the plaintiff's injury, did the condition and appearance of said hole, with said sticks therein, render the highway at the place unsafe, and dangerous for public travel thereon by means of vehicles drawn by horses? Answer. No. Eighth question: Was the horse which drew the buggy in which the plaintiff was riding at the time of the injury an ordinarily gentle and reliable horse for driving on public highways? Answer. Yes. Ninth question: Did the condition and appearance of said hole, with the sticks therein, frighten the horse, and cause him to shy toward the west, and thereby to run the hind wheel of the buggy off from the west end of the bridge? Answer. Yes. (a) As to the frightening of the

horse, we answer, Yes. (b) As to the shying toward the west we answer, No. (c) As to thereby causing the wheel to run off from the bridge we answer, No. Tenth question: If said hole, with said sticks therein, had not been in the highway, at the time of plaintiff's injury, would it have occurred? Answer. We don't know. Eleventh question: If the bridge had been provided with guards or railings at the time of plaintiff's injury, would it have occurred? Answer. No. Twelfth question: For how long before the injury occurred had said hole existed in the highway in substantially the same condition in which it was just before said overseer placed the sticks in it? Answer. One week. Thirteenth question: In the exercise of ordinary care and diligence should the proper officers of the town have known of the existence of said hole, and have made such repairs there as to have made the highway reasonably safe for travel thereon at that point, before the plaintiff was injured, if it was not then repaired so to be reasonably safe? Answer. Yes. Fourteenth question: In the exercise of ordinary care and diligence should the proper officers of the town have caused guards or railings to have been placed on said bridge before plaintiff was injured? Answer. No. Fifteenth question: At the time and place of the injury, did plaintiff's son drive and handle the horse with reasonable and ordinary care and skill? Answer. Yes. Sixteenth question: When the horse shied, if he did so, was he only momentarily beyond the control of the driver, or was the horse then more than momentarily beyond such control? Answer. Only momentarily. Seventeenth question: Did any want of ordinary care or skill on the part of the driver of the horse contribute to produce the injury which plaintiff sustained? Answer. No. Eighteenth question: Did any want of ordinary care on the part of the plaintiff contribute to produce the injury which said plaintiff sustained? Answer. No. Nineteenth question: Were the absence of railings or guards for the bridge, and the condition and appearance of said hole with the sticks therein, considered together, the proximate cause of the plaintiff's injury? Answer. No. Twentieth question: Was the highway, at the time and place of the injury, reasonably safe for persons traveling thereon with horses and vehicles, and in the exercise

of ordinary care? Answer. Yes. Twenty-first question: If the court shall be of the opinion that plaintiff is entitled to judgment, at what sum do you assess the damages which will be a reasonable compensation to her for the injuries she sustained? Answer. $200.00."

The defendant moved for judgment upon the verdict, and the plaintiff moved to strike out certain answers therein, and insert other answers specified in the motion; also for judgment upon the verdict, whether amended or not; also to set aside the verdict and for a new trial. The motions were heard and considered together, and the court denied defendant's motion for judgment; also the plaintiff's motion to amend the verdict and for judgment; and entered an order "that the special verdict is set aside for inconsistency and evasiveness, and a new trial granted; the costs of the first trial to abide the events of the action." From this order the defendant appeals.

For the appellant there was a brief by *Wigman, Martin & Martin,* and oral argument by *P. H. Martin.*

For the respondent there was a brief by *Frank Kwapil,* attorney, and *M. T. Parker* and *Nash & Nash,* of counsel, and oral argument by *Mr. L. J. Nash* and *Mr. Parker.*

WINSLOW, J. The order setting aside the verdict and granting a new trial in this case was not an order made in the exercise of that general discretion which the trial court has on the subject. It was an order based solely on the legal conclusion that the special verdict was inconsistent and evasive. If this was a mistaken conclusion, then the order should be reversed. It cannot be sustained on the ground that it was an exercise of the court's discretion, because that ground is negatived by the terms of the order itself. *Mullen v. Reinig,* 68 Wis. 408, 32 N. W. 293. The simple question presented by the appeal, therefore, is whether the verdict is in fact inconsistent and evasive. While the question as to the form of the

verdict is not necessarily involved, it seems proper to say that the verdict in the present case is entirely too long and complicated for so simple a case. It amounts to a cross-examination of the jury, and covers questions simply evidentiary in their character. The facts in the case were mostly undisputed, and the issues necessary to be submitted to the jury were few. Without intending to dictate the form of the questions which should have been submitted, it may be said that the material issues were substantially as follows: (1) Was the highway defective by reason of the placing of the sticks in the hole by the overseer of highways; or, in other words, was the appearance of the sticks such that horses of ordinary gentleness would naturally and probably be frightened thereby? (2) Was the plaintiff's horse an ordinarily gentle horse for highway driving? (3) Was the horse frightened by the sticks, and did the plaintiff's injuries result from such fright? (4) Did the driver of the horse exercise ordinary care in his driving? (5) If not, did his want of ordinary care contribute to the happening of the accident? And (6) what is the amount of the plaintiff's damages? A comparison of the questions suggested with the questions actually submitted to the jury will demonstrate the unnecessary length of the verdict. Passing, however, to the question whether the verdict as rendered is in fact inconsistent or evasive, we find ourselves unable to agree with the conclusion of the trial court. The essential facts found by the jury are that the highway was not defective; that the horse was ordinarily gentle; that it was, however, frightened by the sticks; and that the driver was not guilty of any contributory negligence. To these facts must be added the undisputed fact that the accident actually happened. Are these facts in any way necessarily inconsistent, or are the answers of the jury evasive? The trial judge filed an opinion when he decided the various motions, from which it appears that he deemed the verdict inconsistent because it acquitted both the town and the driver of negli-

gence. In this opinion, while conceding that the inference of pure accident or misfortune might, perhaps, be drawn from the verdict, he seems to conclude that, because neither party urged that theory, but the plaintiff urged negligence of the town as the cause, and the defendant urged the negligence of the driver as the cause, therefore a verdict finding that neither of these causes existed is inconsistent, and cannot stand. This certainly does not follow. If the jury, by their answers, have found upon sufficient testimony that the occurrence was a pure accident, without negligence on either side, the defendant is entitled to the benefit of that conclusion. The negativing of negligence on one side does not, in such a case as this, necessarily involve the conclusion that there was negligence on the other side. Accidents for which no one can be held responsible frequently happen. Horses of ordinary gentleness, properly driven, frequently shy, and do damage, for no perceptible or sufficient cause.

The trial judge seems also to have considered that the answer to question No. 13 of the verdict is inconsistent with the other answers of the verdict which find that the highway was reasonably safe for the use of travelers. This conclusion also seems untenable. Question 13 is a hypothetical question purely. By it the jury were asked whether the town officers should have known of the existence of the hole, and repaired it, so as to make the road safe, before the plaintiff's injury, *if it was not then repaired so as to be safe.* By answering this question in the affirmative, the jury simply found that, upon the supposition that the road was not safe when plaintiff was injured, then it should have been repaired. They cannot be held to have found by this that the fact which was only supposed for the purpose of the question really existed. Logically, they should not have answered this question at all, because they had found as a fact that the road was safe, and they should have been instructed not to answer it if they found as a fact that the road was safe.

In our judgment, the verdict tells a plain and consistent story of a pure accident, for which no one is liable, and the motion for judgment on the part of the defendant should have been granted.

By the Court.—Order reversed, and action remanded, with directions to enter judgment on the verdict for the defendant.

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116 517
117 221

TWEEDDALE, Appellant, vs. TWEEDDALE and others, Respondents.

January 14—February 3, 1903.

Contracts for benefit of third person: Assent: Right of action: Privity: Rescission: Consideration: Mortgages: Foreclosure: Recording: Constructive notice.

1. If a person makes a contract with another for the benefit of a third person, the latter may enforce it at law regardless of his relations with the first person or whether he had any knowledge of the transaction between such first person and such other at the time of its occurrence, and regardless of any formal assent thereto on his part prior to the commencement of the action.
2. Upon the happening of such a transaction as that above mentioned, the law operates upon the acts of the immediate parties thereto, at once creating all the relations of privity between the one making the promise and the one to be benefited thereby requisite to binding contractual relations between them.
3. Contractual relations being established in the manner indicated in the preceding paragraph, neither one nor both of the immediate parties to the transaction can rescind the same or in any way interrupt or prejudice the rights of such other without his consent.
4. A. having conveyed land to B. and in consideration thereof taken a contract obligating B. to perform certain services for him conditioned upon B.'s retaining the title to the property during the term the services are to be performed, and further obligating himself, in case of a sale thereof, to pay A. a specified sum of money, and to pay C. and D., strangers to the trans-

action, certain specified sums of money also, and having taken a mortgage on the land to secure the performance of such contract, the total consideration mentioned in the same being the aggregate of all the contingent payments, and such mortgage being so drawn as to indicate the terms of such contract though it went to A. only, and B. having sold the property, he became, immediately upon the consummation of such sale, absolutely indebted to A., C. and D. for the sums agreed to be paid as aforesaid.

5. In the circumstances above named, though the amounts which B. for the consideration moving from A. promised to pay to C. and D. were in effect gifts to the latter, the consideration between the immediate parties to the transaction supported the promise as between B. and the beneficiaries C. and D., as effectually as if they were actual parties to such transaction and parted with a consideration to either A. or B. to support the promise made for their benefit, the effect thereof being to vest in them the absolute right to the benefit of the promise, regardless of anything the immediate parties to such transaction subsequently did without their consent.

6. In the circumstances above mentioned, the mortgage securing the contract having been properly recorded, though the same was fully satisfied of record, in form, by A. at the request of B. at the time of his sale of the property, and his vendee having paid the full consideration agreed upon by him, and all the circumstances related having occurred before C. and D. had any knowledge of their rights under the contract and security, such rights were nevertheless not impaired by such satisfaction. The debt of B. to them became absolute by the operation of law upon the acts of A. and B. in the original transaction, and the record of the mortgage constituted constructive notice thereof to B.'s vendee, rendering him a party to the wrongful satisfaction of the mortgage by A.

7. Under the circumstances stated in the foregoing, it was competent for either C. or D., notwithstanding the satisfaction of the mortgage, to prosecute a suit for a foreclosure of the same to enforce the performance of the promise made for their benefit.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Kewaunee county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action to foreclose a mortgage. The facts admitted by the pleadings and found by the court are as follows: October 21, 1896, Mary Tweeddale owned certain land constituting her

homestead. She conveyed the same to her son, the defendant, *Daniel Tweeddale,* taking therefor a bond for her support. Said parties thereafter united in conveying the land to one *Perry.* In consideration therefor, in part, he conveyed the land covered by the mortgage in suit, to *Mr. Tweeddale.* Such land was then incumbered by a mortgage, and a second mortgage was placed thereon by the grantee to the grantor. In lieu of the interest which Mary Tweeddale had in the land conveyed to *Perry;* her son gave to her a bond for support, and secured the same by the mortgage in suit upon the land conveyed by *Perry* to her. The indebtedness was $1,350. It was conditioned, among other things, that in case *Tweeddale* should at any time sell the land or any portion thereof covered by the mortgage, $1,200 should immediately become due from him to his mother, $50 should likewise become due to his sister, *Margaret Merverden,* and $100 to his brother, *Edward Tweeddale.* The mortgage specified that it was given to secure all the obligations and conditions of the bond. It was executed and acknowledged so as to entitle it to be recorded under the registry laws of this state, and was duly recorded. The land covered by the mortgage passed under the control of *Daniel Tweeddale,* and the bond and mortgage, when executed, were delivered to his mother. Subsequently the condition mentioned in the bond, making operative the promise to pay $1,200 to Mrs. Tweeddale, $50 to her daughter and $100 to her son, who is the plaintiff in this action, was satisfied by *Daniel Tweeddale* selling the land covered by the mortgage, to *John Paul.* At the time of such sale the claim of Mary Tweeddale under the bond was settled and paid at $686. She thereupon, in form, fully satisfied the mortgage by signing the usual memorandum to that effect in the margin of the record thereof. Plaintiff did not give her any authority to satisfy the mortgage as to his interest therein. Being unable to obtain payment of the sum secured to him by the mortgage, he commenced this action to foreclose the same.

Neither he nor his sister knew that the bond and mortgage made any provision for them till after the mortgage was discharged.

In the nature of conclusions of law, the court made findings to the effect that the provisions in the bond and mortgage as to plaintiff and his sister, under the circumstances existing at the time the mortgage was discharged, were mere incomplete gifts, subject to be recalled by Mrs. Tweeddale, and that she then recalled them. All matters of fact not specifically mentioned, entitling plaintiff to the relief prayed for in his complaint if the interest in form secured to him by the bond and mortgage vested in him beyond the control of his mother upon the execution and delivery of the papers to her, were found by the court or admitted by the pleadings.

The court held as a matter of law that plaintiff had no cause of action, and ordered the complaint dismissed with costs. Judgment was entered accordingly.

The cause was submitted for the appellant on the briefs of *John Wattawa,* attorney, and *Nash & Nash,* of counsel, and for the respondents on that of *M. T. Parker,* attorney, and *Geo. W. Wing,* of counsel.

MARSHALL, J. The agreement by *Daniel Tweeddale* to pay plaintiff $100 and his sister $50, as part of the consideration for the property which came to him from his mother, stands upon the same footing as any promise made by one person to another, for a consideration, for the benefit of a third person. As soon as the title to the land was vested in *Daniel Tweeddale* and the bond and mortgage were delivered to his mother, he became obligated to pay to them that part of the consideration for the land represented by the sums secured to his brother and sister, if the principle controls that a grantor of land becomes obligated to pay the whole or a part of the consideration for the property conveyed to him to a stranger to the transaction if it is left in his hands for

that purpose, and upon his promise to make such payment. We apprehend the trial court so viewed the matter. Notwithstanding the finding that the sum secured to appellant and that secured to his sister were mere gifts, the turning point in the case, in the mind of the circuit judge, we apprehend, was that the beneficiaries did not know of the agreement and did not accept the same or in any way become parties thereto till their mother, with the consent of *Daniel Tweeddale,* rescinded the transaction. An agreement by one person, upon a good consideration, to pay his debt to another by paying the same to a third person, is just as binding where there is no consideration for the promise between the immediate promisee and the third person as where there is such consideration. Whether the benefit secured to the third person is a gift, strictly so called, or one intended, when realized, to discharge some liability of such promisee to the third person does not change the situation. It is the exchange of promises between the immediate parties, and the operation of law thereon, that binds the promisor to the third person. The idea which ruled this case,—that where a person for a consideration paid to him by another agrees to pay a sum of money to a third person, a stranger to the transaction, the latter does not thereby become possessed of the absolute right to the benefit of the promise, nor until he accepts the same in some way; and that while he is ignorant of the promise, or thereafter, at any time before he assents to the transaction, it may be rescinded,—we must admit is well supported in the books. The authorities so holding, in the main, go upon the ground that privity between parties is absolutely essential to a liability of one to another of a contractual nature, and that until the third person brings himself into privity with the one who has promised to be his debtor by at least assenting thereto, he has at least no legal right to the benefit of the promise; and that, till then, the parties to the transaction may rescind it or change it

as they see fit. There is also much authority to the effect that, while the element of privity between the promisor and the third person is essential to render the promise absolutely binding upon the former, no act of the latter is necessary thereto; that the law, operating upon the acts of the parties to the transaction, creates the privity immediately upon its being consummated between them, and that neither one nor both of them can thereafter, without the third person's consent, enforce the promise. The first class of authorities is well represented by the following: *Trimble v. Strother,* 25 Ohio St. 378; *Brewer v. Maurer,* 38 Ohio St. 543; *Crowell v. Hospital,* 27 N. J. Eq. 650; *Durham v. Bischof,* 47 Ind. 211; *Davis v. Calloway,* 30 Ind. 112; *White v. Hunt,* 64 N. C. 496. The second class of authorities is fairly well represented by the following: *Bay v. Williams,* 112 Ill. 91; *Dean v. Walker,* 107 Ill. 540; *Hare v. Murphy,* 45 Neb. 809, 64 N. W. 211, 29 L. R. A. 851; *Graves v. Macfarland,* 58 Neb. 802, 79 N. W. 707; *Brewer v. Dyer,* 7 Cush. 337; *Mallett v. Page,* 8 Ind. 364; *Henderson v. McDonald,* 84 Ind. 149; *Pruitt v. Pruitt,* 91 Ind. 595; *Rodenbarger v. Bramblett,* 78 Ind. 213; *Frank v. New York, L. E. & W. R. Co.* 7 N. Y. St. Rep. 814; *Esling v. Zantzinger,* 13 Pa. St. 50.

It is useless to endeavor to review the authorities touching the subject before us with a view of harmonizing them upon any one single theory as to the principle upon which the liability to the third person is based, or as to what are the essential elements to effect it. There is as much confusion, probably, in the judicial holdings in respect to the matter, as on any question of law that can be mentioned. As indicated, there are authorities to the effect that there is no absolute liability to the third person till in some way he is brought into privity with the promisor. Others are to the effect that such privity is entirely unnecessary. Others, as we have indicated, hold that while the element of privity is necessary,

the law creates it, no act of the third party being necessary thereto. There are others to the effect that there is no liability at law without the element of privity between the promisor and the third person, hence, if he has a right to enforce the promise the remedy is in equity unless he can show that he adopted the promise made for his benefit so as to become a party thereto. There are many other phases of the question that find support in the books. The liability is sustained in some cases under the doctrine of novation, and held not to exist in the absence of any of the elements necessary to satisfy the law on that subject. In other cases it is held that there is no principle of subrogation or novation involved in the liability; that it rests solely upon and is fixed absolutely by the transaction between the person making the promise and receiving the consideration and the person to whom the promise is made and from whom the consideration moves. There is confusion not only between different courts, but confusion in the decisions in many jurisdictions in the same court. The supreme court of Illinois, in *Bay v. Williams,* 112 Ill. 91, speaking on the subject, correctly described the situation in the following language:

"The courts are not harmonious,—not even the courts in the same states,—and it may be added that the cases are not capable of being reconciled. . . . On the mere authority of adjudged cases in other tribunals, we would have to vacillate to keep in line."

The extent to which the first class of cases we have mentioned goes in one direction is indicated by the following from the syllabus of *Trimble v. Strother,* 25 Ohio St. 378:

"In an action to recover a debt which the defendant agreed with a third party to pay the plaintiff, it is a good defense to show that before the plaintiff assented to or acted on the promise made in his favor, the agreement had been rescinded."

The sharp conflict between the two principal classes of cases is well indicated by reading in connection with that

quotation the following from the syllabus of *Bay v. Williams, supra:*

"A purchaser of mortgaged premises from the mortgagor, who assumes payment of the mortgage debt, or who accepts a conveyance reciting his assumption of the same with a knowledge of such recital, will at once become personally liable to the mortgagee for the mortgage indebtedness; and he cannot defeat the mortgagee's right to hold him responsible, by procuring a release from the mortgagor."

It is believed that this court is committed to that doctrine, though it must be admitted that there are expressions in several opinions that may well be taken as indicating either a contrary view or that it is uncertain just what the rule here is on the subject. To illustrate, in *Putney v. Farnham,* 27 Wis. 187, we find this language:

"After notice, therefore, to them (the third persons), and their assent, the liability of the defendant . . . was absolutely fixed. . . . It was no longer in the power of Corlett (the immediate promisee) to forbid payment or to withdraw his assent, or to require payment to be made to himself, without the consent of Fallon and Gallagher."

There is impliedly a decision that, till the third person receives notice of the agreement made for his benefit, and assents to it, the immediate parties to the transaction may rescind it, or the immediate promisee may himself change the direction of the benefit. In *Bassett v. Hughes,* 43 Wis. 319, the expression in *Putney v. Farnham* was repeated. In *Enos v. Sanger,* 96 Wis. 150, 70 N. W. 1069, language was used, taken by itself, indicating that privity between the third person and his promisor does not exist prior to his adoption in some way of the promise. But after discussing authorities in this and other states bearing on the subject, the law as stated in *Brewer v. Dyer,* 7 Cush. 337, and *Bay v. Williams,* 112 Ill. 91, was approved as more fully stating the established doctrine here than any language used in our own decisions. For the purpose of clearing up any uncertainty existing here

the following, substantially, as a judicial rule, was deduced from our decisions and the authorities which met with our approval:

'Where a grantee in a conveyance assumes and agrees to pay the debt of a third person to his creditor, neither such person nor such creditor being connected contractually with the grantor, as part of the consideration for his purchase, there is no necessity for any consideration to pass from such third person or his creditor to such grantee to support such agreement. A portion of the consideration for the purchase being left in such grantee's hands, appropriated by the grantor to the payment of the debt which such grantee agrees to pay in consideration of the conveyance and of such appropriation, he cannot be heard to object to the performance of his contract because his grantor was not liable for such debt. When the grantor makes such an appropriation, and the grantee, for a sufficient consideration, promises to pay the amount so appropriated to the creditor of such third person, such grantee thereby becomes liable to such creditor; and such liability rests solely on such consideration and such promise.'

That is in harmony with the language used on the subject in *Bishop v. Douglass,* 25 Wis. 696; and *Palmeter v. Carey,* 63 Wis. 426, 21 N. W. 793, 23 N. W. 586. In *Stites v. Thompson,* 98 Wis. 329, 73 N. W. 774, it was said that out of the transaction of one person promising, for a consideration paid to him by another, to pay a sum of money to a third person, the promisor becomes a debtor of such third person the same as if the promise were made directly to him, as liability is determined by his undertaking with his immediate promisee. In *Etscheid v. Baker,* 112 Wis. 129, 88 N. W. 52, the last case here where the subject is discussed, *Bassett v. Hughes* is cited and some significance given to the fact that the person for whose benefit the promise was made knew of and assented to it before any attempt was made to revoke it. However, *Enos v. Sanger* was cited, and there was no intention to disturb the rule there laid down and re-enforced in

Stites v. Thompson. Without further discussion of the matter we adhere to the doctrine that where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person without his consent. It is plainly illogical to hold that immediately upon the completion of the transaction between the immediate parties thereto, the law operates upon their acts and creates the element of privity between the promisor and the third person, and at the same time to hold that such third person's status as regards the promise may be changed thereafter without his consent. The idea that privity between the promisor and the third person is necessary to render the transaction between the original parties thereto beyond the reach of either of them to revoke it, or both acting together to rescind it, springs from the supposed necessity of contractual relations between the promisor and the third person, binding upon the promisor at law. The moment such essential is established, it seems clear that such third person's right accrues and becomes absolute.

True, the doctrine that the element of privity may be established without the knowledge or assent of the third person, other than that constructive assent arising from the operation of law upon the acts of the parties, is inconsistent with the rule prevailing here as to all but married women, that a mere beneficiary of a policy of life insurance has no vested rights therein; but so is the doctrine that mere assent by a third person to a promise made for his benefit will render it irrevocable, inconsistent therewith. Neither the assent of a mere beneficiary in a policy of life insurance, to the promise made for his benefit, nor such assent coupled with an independent promise by the insurance company to him to abide thereby, has any effect upon the power of the assured to control the policy by changing the beneficiary or disposing of the insurance fund by will. The doctrine here in that regard was established at an early day. It is contrary to the rule which prevails generally. It is adhered to under the rule of *stare decisis,* and the doctrine that rules of property established by judicial decisions long adhered to should not be disturbed even if a different decision would be rendered if the court were permitted to treat the subject from an original standpoint. The rule as to insurance contracts has not been applied by this court to any other class of contracts. The court is not disposed to treat it as a principle of general application or extend it beyond the special class of contracts to which it has been applied.

In view of what has been said we must hold that, upon the sale of the land to *Paul, Daniel Tweeddale* became absolutely indebted to plaintiff upon the bond and mortgage mentioned in the complaint for the sum of $100; that the satisfaction of the mortgage by Mary Tweeddale is void as regards such debt; that his interest in the bond and mortgage was sufficiently brought home to *Daniel Tweeddale's* grantee, *Paul,* by the record of the mortgage, to preclude him from being an

innocent party to the void satisfaction and successfully invoking the registry laws for protection.

By the Court.—The judgment is reversed and the cause remanded with directions to render judgment in favor of plaintiff in accordance with this opinion.

MACKIN, Administrator, Appellant, vs. HOBBS and another, Respondents.

January 14—February 3, 1903.

Estates of decedents: Executors and administrators: License to sell realty: Date: Renewal: Limitation: Supreme court: Discretionary orders: When supreme court may enter? Laches.

1. On May 23, 1898, the county court licensed an administrator with the will annexed to sell real estate for the payment of debts of decedent, but refused license to sell for payment of expenses of administration. On appeal the supreme court held that portion of the order refusing license was erroneous, and, in accordance with the mandate of the supreme court, the county court entered the proper order January 16, 1900. *Held*, that, until January 16, 1900, there was no order and license to sell real estate warranted by the petition and the law, and that the two years, provided by sec. 3889, Stats. 1898, within which the county court might, in its discretion, extend such license, did not commence to run until that date.
2. Under sec. 3889, Stats. 1898 (providing that an order licensing an administrator or executor to sell real estate having been made, the county court making the order may, on application of the administrator or executor and for good cause shown, extend the time for making the sale, but not longer than two years after the date of the original order), the discretion vested in the county court may be exercised at any time within the two-year limit, and after the one year allowed for the sale in the first instance.
3. Where a county court has refused to extend the license granted to an administrator to sell realty solely because the first year within which such sale was directed to be made had expired, and the circuit court on appeal has not attempted to exercise

its discretion over that question, but the facts all appear in the record, the supreme court may properly examine those facts, and decide thereon whether the application should have been granted.

4. On appeal from an order of the county court refusing to extend the license granted an administrator to sell real estate, denied solely because application therefor had been made after the year, within which the administrator had been licensed to sell, had expired, it appeared, among other things, that all debts and legacies had been paid, and that the only unpaid demands were the expenses of administration; that the administrator was appointed in 1893; that until May 13, 1901, except the time between March 2, 1898, when the petition for license was filed, and November 21, 1900, when an injunction restraining the administrator from acting under the license was dissolved, delay was chargeable to the administrator, and that after the dissolution of the injunction the administrator, with nothing to prevent, took no steps to make a sale until May 13, 1901. *Held*, that the administrator was guilty of laches, and, under the circumstances presented, the county court, instead of extending the time, should have compelled an immediate final accounting from the administrator, and entered its final order thereon, assigning the estate, subject to valid charges, to the persons entitled thereto.

[5. Whether under sec. 3850, Stats. 1898 (providing that the county court may extend the time for the settlement of a decedent's estate, "but in no case shall the time be extended beyond six years from the time of granting letters testamentary or of administration"), the administration of an estate is wholly terminated at the end of six years, not decided.]

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Mackin was appointed administrator with the will annexed of the estate of Patrick Madden, deceased, in 1893. Said estate consisted almost exclusively of a parcel of land, to which the widow of the testator was entitled, in possession, during her life, and which, after her death, was devised one-half, clear of incumbrances, to a son, Philip, certain money legacies out of the land to others, and the residue after payment of debts, to Mary Ann Brown. Debts were proved to a

small amount. The several legatees joined in making a mortgage upon the land to the defendant *Hobbs,* and, later, in conveyance of the entire equity to defendant *McCullough.* Thereafter, in 1898, the administrator applied for license to sell the interest of the residuary devisee, Mary Ann Brown, in the real estate, for the payment of debts and expenses of administration, but did not give personal notice to either *Hobbs* or *McCullough.* The county court issued license to sell for payment of debts, but not for payment of expenses of administration. On appeal from that order through the circuit court to this court, that portion refusing the application for authority to sell for payment of expenses of administration was held erroneous, and was reversed (*In re Madden's Will,* 104 Wis. 61, 80 N. W. 100), and the cause was finally remitted to the county court, with directions to modify the previous order so as to authorize sale for both purposes; and an order for such modification was entered in the county court on January 16, 1900. *Hobbs* immediately thereafter commenced action to foreclose his mortgage, and procured temporary injunction restraining the administrator from selling, assigning, or in any manner interfering with any of the real estate, which order continued until that action was dismissed as to the administrator in November, 1900. January 21, 1901, the circuit court entered a "stay of proceedings" for sixty days under the foreclosure judgment. On May 23, 1901, more than one year after the modification of the order for sale of real estate, and more than three years after entry of the original erroneous order, the administrator applied for an extension of time for sale to January 16, 1902. This order was denied by the county judge, with the recitation in the order that it appeared that the application was not made within a year from the date of the license, to wit, January 16, 1900. The administrator appealed to the circuit court from this order, and that court, after filing an extended opinion, making apparent that he considered the true date of the license

to sell to have been May 18, 1898, and that no power existed to extend such license beyond two years from that date, affirmed the order of the county court. From such judgment of the circuit court the administrator brings this appeal.

For the appellant there was a brief by *Duffy & McCrory*, and oral argument by *J. H. McCrory*.

For the respondents there was a brief by *E. Blewett*, and oral argument by *Mr. Blewett* and *Mr. D. D. Sutherland*.

DODGE, J. The questions of law discussed by the circuit court were numerous, and some of them quite immaterial to the final conclusion which we have reached upon the questions presented upon this appeal, which seems to us to dispose of those questions in the most direct and final manner; hence but few subjects discussed by counsel will need review in this opinion.

We deem it entirely plain that the county court was right in holding that the date of the license to sell real estate was January 16, 1900, and not May 23, 1898. This court, upon the former appeal, decided that the attempted order of May 23, 1898, was not that which it was the duty of the county court, under the law, to enter in response to the petition presented by the administrator, and never until the return of the *remittitur* from the circuit court directing modification in accordance with the decision of this court, nor until the order of the county court carrying such directions into effect, was there made the order and license to sell real estate warranted by such petition and the law. Hence, under that license, assuming, but not deciding, jurisdiction to have existed to enter it, appellant was authorized to sell the real-estate interest of Mary Ann Brown in the manner prescribed by statute within one year from January 16, 1900, and up to such later date as might be fixed by extension by the county court in its discretion, not exceeding two years from January 16, 1900. Sec. 3889, Stats. 1898. We, however, disagree with the county

court in its next conclusion,—that in May, 1901, when the administrator applied for such extension, its power to consider and exercise its discretion over the propriety of granting it no longer existed, merely because the first year had expired. We find nothing in the statute which required that such extension be granted during the one year allowed for the sale in the first instance, and there is no good reason why, within the two-year limit, the discretion broadly vested in the county court by sec. 3889, Stats. 1898, to permit sale under the original license may not be exercised. The county court should, therefore, upon the administrator's application in May, 1901, have considered the propriety of granting the extension requested in the light of the facts then existing. This it did not do, nor has the circuit court attempted at any time to exercise discretion over that question. Had either court done so, we should probably have felt constrained to adhere to the conclusion it reached, unless we deemed such discretion to have been abused. In the absence of such guide, but having the facts all before us, we have decided to examine those facts, and decide thereon as to whether appellant's application ought to have been granted.

The situation then presented may be summarized as follows: All debts and legacies having been paid, the administrator was the only person to be convenienced or benefited by a sale under authority of the county court. The protracted delay in taking this step from July, 1893, to May, 1901, was all chargeable to the administrator, except that beween his application for license, March 2, 1898, and dismissal of the injunction against him, November 21, 1900. From the last-named date to May 13, 1901,—a period of nearly six months,—the administrator, with nothing to prevent, had neglected to take any steps to make the sale, which might have been made within a month from such dismissal of injunction. At the time he applied to the court to intervene in his behalf he was, therefore, involved in such serious laches

as to have no strong equity. At that time, too, the six-year limit had been passed, beyond which the county court is, by sec. 3850, Stats. 1898, prohibited from granting further express extensions of time for settlement. Whether that statute is so drastic and self-executing as to wholly terminate the administration, as intimated in *In re Pierce,* 56 Wis. 560, 14 N. W. 588, or whether power is still left in the county court to complete the settlement of the estate, so that the will and the law of descent and distribution may have effect, as seems to be indicated in *Scott v. West,* 63 Wis. 529, 555, 24 N. W. 161, 25 N. W. 18, and *Ford v. Ford,* 88 Wis. 122, 134, 59 N. W. 464, still there can be no doubt that it declares a legislative policy in favor of closing estates within the six years, upon which county courts should permit no infringement not strictly necessary to accomplish the assignment and distribution of the property to those entitled. Beyond that period estates should not be kept open to enable county courts to take steps which can well be taken elsewhere after the final order has been made. At the time under discussion there remained but two steps essential to the complete settlement of the estate which could only be performed by the county court. Those were the settlement of the accounts of its officer, the administrator, and the assignment of the real estate to those entitled under the will. The only remaining charge upon that real estate was for expenses of administration, made in the will by necessary implication from the charge to pay debts. *In re Madden's Will,* 104 Wis. 61, 80 N. W. 100. This burden might be discharged in several ways. The expenses might be paid by the devisee. The property might be sold under order of the county court as a step in the settlement of the estate, and the expenses paid from the proceeds; or that charge, like any other upon real estate, can be enforced by a court of general equity jurisdiction. Doubtless it is better generally that the whole matter should be disposed of in county court, but that is not absolutely necessary, and its ad-

visability should yield to so strong a countervailing consideration as the definite statutory policy declared in sec. 3850, Stats. 1898. We are convinced that the county court, instead of breaching that policy by granting extension, as asked, for another eight months, ought to have compelled the administrator to immediate final accounting, and entered its final order thereon, assigning the real estate to the devisees or their assigns, subject to a charge upon the interest given to Mary Ann Brown for the amount of the expenses of administration, as ascertained, in deference to the decision of this court upon the former appeal, *ubi supra;* which, whether binding the purchasers *pendente lite* as *res adjudicata,* would, of course, guide the county court as a rule of law supported by *stare decisis.* Hence, albeit upon entirely different grounds, and without adopting or affirming the various legal conclusions of the courts below further than as expressly stated, we reach the conclusion that the administrator's application for further extension of time ought to have been denied, and that the order to that effect should stand.

By the Court.—Judgment affirmed.

SIZER, Executrix, Appellant, vs. CLARK, Respondent.

January 14—February 3, 1903.

Landlord and tenant: Option to purchase: Acceptance of option: Notice: Tender of performance: Evidence: Material error: Exceptions: Instruction to jury.

1. An option contained in a lease provided that, in case the lessee "should wish to buy" the premises at any time during the period of the lease, the lessor would sell and deliver the same to the lessee, free and clear of all debts and taxes. The lessee made improvements relying on the option, and, eight days before the termination of the lease, gave the lessor verbal notice of his election to purchase, and was ever afterwards able, ready, and willing to receive a conveyance and make the pay-

ment. By reason of the absence of the lessor the lessee was unable to make an actual tender and demand of a conveyance until nineteen days after the expiration of the lease, which was then done, the lessee meanwhile remaining in possession of the demised premises. *Held*, that the agreement only required the lessee to notify the lessor that he wished to buy and pay the price to make it a binding contract, and the notification given was sufficient.

2. In such case, by reason of the agreement contained in the lease, and the election of the lessee, the conventional relation of landlord and tenant was terminated and superseded by a contract for the purchase of the premises.
3. In such case, it further appeared that the lessor, prior to the termination of the lease, conveyed to one who took with full knowledge of all the facts. The covenants contained in the lease were expressly made binding on the parties thereto and "their assigns." *Held*, that when the lessee, prior to the expiration of his lease, notified the lessor of his election to exercise the option to purchase, the lessor and his grantee both became bound to make the conveyance on payment of the agreed price to the lessor.
4. In such case, it is not error to admit testimony as to lessee's ability and readiness to pay the purchase price, and that the lessee had acted on the assumption that the contract was binding.
5. On the trial of an action the court, in presenting the issues to the jury, read to the jury portions of the defendant's pleading. The charge was fair throughout. *Held*, that no error was thereby committed.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This action was commenced April 17, 1900, by the plaintiff's testatrix, Susan H. Sizer, to remove the defendant from certain premises described, on the ground that he was wrongfully holding possession thereof after the expiration of the lease under which he entered into such possession. It appears, and is undisputed, that March 2, 1897, Susan H. Sizer's grantor, R. B. Sizer, then the owner of the premises, made a lease in writing of the same to the defendant for the term of one year from April 1, 1897, therein agreeing to give to the defendant at the end of the first year the refusal for

two additional years at the same annual rental of $180 per year, payable in monthly payments of equal amounts; and the said lease contained a provision to the effect that the said R. J. Sizer therein further agreed "to sell the property" to the defendant, "should he wish to buy it, at any time during the period of this lease or the extension, for the sum of $3,000, and to deliver the same to" the defendant "free and clear of all debts and taxes, for the aforesaid price of $3,000 cash." The defendant therein agreed to pay the rent at the times and in the manner aforesaid during the continuance of the lease, and not to underlease the premises, nor assign the lease "without the consent of the lessor, and to quit and to deliver up the same to the lessor peaceably and quietly at the end of said term," etc. And the lease also contained a provision that "the covenants herein contained shall bind the parties mutually, and their respective heirs, executors, administrators, and assigns." The complaint alleges, in effect, the facts stated, and also that the defendant failed to purchase such premises as stipulated in the lease; that the period of the lease had expired; that the defendant held over the premises unlawfully and without permission of the complainant or the said R. J. Sizer; that April 6, 1900, the defendant was served with a written notice requiring the delivery of the premises to the complainant. Judgment was demanded that the defendant be removed from the premises. The defendant answered by way of admissions, denials, and counter allegations, to the effect that he had an option to purchase the premises at any time before April 1, 1900, for $3,000; that, relying upon such option, he had expended money and labor in improving the premises, and decorating the interior of the house, and filling up the yard; that March 26, 1900, the defendant notified R. J. Sizer of his election to purchase the premises, and that he was then ready to pay the agreed consideration of $3,000; that R. J. Sizer then and there promised to carry out such agreement, and agreed to complete

the sale, and have the necessary papers made out to consummate the purchase; that the defendant repeatedly went to the office of the attorneys of R. J. Sizer to see that the papers were made out, as agreed, but that they were not so made out; that he continued to go to the office of such attorneys to see about such papers until he was notified to deliver up the premises, April 6, 1900; that the defendant and another on March 30, 1900, went to the abode of R. J. Sizer, and tendered payment of the $3,000, and then and there demanded of him a deed of the premises in accordance with the terms of the contract, and that such tender and demand were proclaimed at said abode of R. J. Sizer for the reason that the defendant was unable to find the said R. J. Sizer, although he made diligent search for that purpose; that he continued to search for the said R. J. Sizer from that time up to April 6, 1900, when the defendant received notice to quit the premises; that the defendant alleges that R. J. Sizer absented himself during the aforesaid times for the purpose of preventing the defendant from making a tender to him of the $3,000; that April 19, 1900, the defendant was given the first opportunity to make the tender, as agreed, which he did, and then and there demanded a deed of conveyance of the premises, and that the said R. J. Sizer refused to accept such tender and to carry out his part of the contract for the sale of said premises; that the defendant is still in the possession of the premises, as the owner of the equitable title thereof; and that he is ready and willing to carry out his part of the contract, and to pay the price of $3,000, as the court may direct.

At the close of the trial, the jury, by the direction of the court and consent of counsel, returned a special verdict to the effect that on or about March 24, 1900, the defendant notified R. J. Sizer that the defendant elected to purchase the premises described, pursuant to the terms of the contract of sale contained in the lease; (8) that when Susan H. Sizer received the deed of the premises from R. J. Sizer to herself

(March 29, 1897), and thenceforth, she knew or understood that theretofore said lease, or an instrument giving to the defendant an option to purchase said premises up to April 1, 1900, had been executed and delivered to the defendant by R. J. Sizer; (10) that April 6, 1900, Susan H. Sizer, plaintiff's testatrix, did cause to be served on the defendant the notice in writing in evidence, demanding of the defendant the possession of the premises; (11) that on or about April 19, 1900, the defendant tendered to R. J. Sizer, in person, $3,000, in legal-tender money of the United States, as payment of the purchase price of the premises under such contract, and demanded of him a deed conveying said premises to the defendant pursuant to said contract, and that R. J. Sizer refused to accept said money, and refused to comply with the demand for a deed. And the jury further found, as matters of fact, (2) that March 30, 1900, the defendant demanded a deed of the premises, and tendered payment therefor, under the circumstances and in the manner alleged in the answer; (3) that March 24, 1900, and at all times since, the defendant was able, ready and willing to receive a conveyance of the premises, and make payment therefor, according to the terms of the contract of sale contained in the lease; (4) that April 6, 1900, the defendant informed R. J. Sizer that the defendant was ready to accept a deed of the premises, and to pay therefor according to the contract, and that, in reply, R. J. Sizer said that it was then too late for the defendant to do so; (5) that April 6, 1900, was the first time after March 24, 1900, when the defendant had any reasonable opportunity to make that statement to the said R. J. Sizer in person; (6) that R. J. Sizer did not absent himself, from March 26, 1900, until April 2, 1900, from his home, for the purpose of avoiding defendant, and in order to prevent him from tendering payment for said premises to, and demanding a deed thereof from, R. J. Sizer, in person, under such contract of sale; (7) that on March 26, 1900, and thereafter up to April 2, 1900,

for the purpose of demanding of said R. J. Sizer a deed of said premises, and of tendering to him payment therefor, the defendant did make diligent and reasonable search and inquiry for said R. J. Sizer, and did fail to find him; (9) that at all times since April 1, 1900, the defendant has held possession of said premises, claiming the right to do so as the equitable owner thereof, under such contract of sale, and the tender or tenders of performance thereof on his part which defendant claims to have made. Judgment was thereupon ordered to be entered in favor of the defendant in accordance with such special verdict. From the judgment so entered, the plaintiff brings this appeal.

For the appellant there was a brief by *Duffy & McCrory*, attorneys, and *J. G. Hardgrove*, of counsel, and oral argument by *J. H. McCrory*.

For the respondent there was a brief by *Swett & Ecke*, and oral argument by *H. E. Swett*.

CASSODAY, C. J. It is conceded that the lease was extended, as therein provided, to April 1, 1900. By the terms of the optional contract therein contained, the lessor, R. J. Sizer, thereby agreed that in case the defendant "should . . . wish to buy" the premises, at any time during the period of the lease, or the extension thereof, for $3,000, he would sell and deliver the same to him, free and clear of all debts and taxes, for the aforesaid price of $3,000 cash.

The first, eighth, tenth, and eleventh findings of the jury were made by the direction of the court, and the consent of counsel, and are undisputed. The other findings of the jury are amply supported by the evidence. From these findings it appears that, eight days prior to the termination of the lease, the defendant notified R. J. Sizer, the lessor, that he had elected to purchase the premises pursuant to the terms of the contract of sale contained in the lease; that the defendant at that time, and at all times since, was able, ready, and

willing to receive a conveyance of the premises, and to make payment therefor as prescribed in the contract; that March 26, 1900, and thereafter up to April 2, 1900, for the purpose of demanding of R. J. Sizer a deed of the premises, and tendering to him payment therefor, the defendant did make diligent and reasonable search and inquiry for R. J. Sizer, and failed to find him; that March 30, 1900, the defendant went to the place of abode of R. J. Sizer in his absence, and made demand for a deed of the premises, and tendered payment therefor, as alleged in the answer; that April 6, 1900, the defendant informed R. J. Sizer that he was ready to accept a deed of the premises, and to pay the agreed price therefor; that that was the first reasonable opportunity for doing so to him in person; and that April 19, 1900, a complete tender of the price, and demand for a deed, were made by the defendant, and refused by R. J. Sizer, as found by the direction of the court and the consent of counsel. Thus it appears that prior to the termination of the lease the defendant informed R. J. Sizer that he wished to buy the premises and pay the agreed price; that he was able, ready, and willing to pay the price and receive the conveyance. True, he was, by reason of the absence of R. J. Sizer, precluded from making an actual tender and demand until a few days after the expiration of the lease. But the agreement only required the defendant to notify R. J. Sizer that he wished to buy, and pay the price of $3,000 cash, to make it binding. *Mueller v. Nortman,* 116 Wis. 468, 93 N. W. 538; *Peterson v. Chase,* 115 Wis. 239, 91 N. W. 687. One having an option in writing for the purchase of land has an interest therein. *Telford v. Frost,* 76 Wis. 172, 44 N. W. 835; *Wall v. M., St. P. & S. Ste. Marie R. Co.* 86 Wis. 48, 56 N. W. 367.

"An option is, in a sense, a continuing offer of a contract; and, if the offeree decides to exercise his right to demand the conveyance or other act contemplated, he must signify that fact to the offerer." 21 Am. & Eng. Ency. of Law (2d ed.) 930.

Such acceptance may be verbally given, as was done in the case at bar. Id. Counsel for the plaintiff invokes the well-known rule that a tenant is estopped from denying his landlord's title. That rule is based upon the theory "that the title of the lessee is in fact the title of the lessor. He comes in and holds by virtue of it, and rests upon it to maintain and justify his position." 11 Am. & Eng. Ency. of Law (2d ed.) 443. So this court held at an early day:

"A tenant cannot dispute the title of his landlord, nor during his term buy in an *adverse* outstanding title to that of his landlord under whom he holds." *Tondro v. Cushman,* 5 Wis. 279.

This court has also held:

"The grantee in a deed is not estopped by his acceptance thereof from showing that since he went into possession the supposed title of his grantor has been devested by a paramount lien and transferred to another, and that he is rightfully in possession under such other." *Moore v. Smead,* 89 Wis. 558, 62 N. W. 426.

So it has been held in Illinois:

"As a general proposition, a tenant cannot dispute his landlord's title, but he may show it has terminated either by its own limitation or by his own conveyance." *St. John v. Quitzow,* 72 Ill. 334.

So it has been held in Massachusetts:

"A tenant at will is not estopped to deny that, since his own entry into possession, his landlord's title has been determined by the act of the landlord." *Emmes v. Feeley,* 132 Mass. 346.

To the same effect, *Lamson v. Clarkson,* 113 Mass. 348.

So it has been held in Maine:

"A tenant is not estopped to deny his landlord's title after that title, under which his own tenancy began, has ended, and the estate has become *vested in the tenant himself.*" *Ryder v. Mansell,* 66 Me. 167.

Here, by reason of the agreement contained in the lease,

and the election of the defendant, the conventional relation of landlord and tenant was superseded and terminated by a contract for the purchase of the premises by the defendant from the lessor.

2. Counsel for the plaintiff contends that, in order to make the optional agreement effectual, the defendant should have made his tender to Susan H. Sizer, to whom R. J. Sizer conveyed the permises after making the lease. She took by quit-claim deed, with full knowledge of all the facts, and made no agreement herself. But, as indicated, the covenants contained in the lease were therein made expressly binding upon the parties thereto, and their respective heirs, executors, administrators, and assigns. R. J. Sizer was not released, however, from his covenants and obligations to perform the contract by conveying to his mother. He continued to collect the rents after he conveyed to his mother. When the defendant, prior to the expiration of the lease, expressed to R. J. Sizer a wish to buy the premises at the price named, he and his mother both became bound to make conveyance. The making of the conveyance and the payment of the price were to be concurrent acts. *Seeley v. Howard,* 13 Wis. 336; *Davidson v. Van Pelt,* 15 Wis. 341; *McWilliams v. Brookens,* 39 Wis. 334; *Williamson v. Neeves,* 94 Wis. 656, 69 N. W. 806. Under the agreement, the price was to be paid to R. J. Sizer by the defendant upon conveyance being made to him, whereby he would get the title to the premises "free and clear of all debts and taxes."

3. There was no error in admitting testimony as to the defendant's ability and readiness to pay the purchase price, and that the defendant had acted on the assumption that the contract was binding.

4. There are a number of exceptions to the charge. The one on which counsel seems to place most reliance is that the court read to the jury portions of the answer in presenting the issues to the jury. The charge seems to be fair through-

out. Neither that exception to the charge, nor any other, has any merit. We find no error in the record.

By the Court.—The judgment of the circuit court is affirmed.

GORDON, Appellant, vs. SULLIVAN, Administratrix, and another, Respondents.

January 14—February 3, 1903.

Municipal corporations: Defective sidewalks: Negligence: Personal injuries: Charter provisions: Action against city and lot owner: Conditions precedent: Evidence: Competency of husband, wife being party: Appeal and error: Special verdict: Submission of questions: Instructions to jury: Immaterial error.

1. Under the charter of the city of Fond du Lac (ch. 152, Laws of 1883), a party suffering injury by reason of a sidewalk being out of repair must exhaust his remedy against the lot owner, as a condition precedent to his right to maintain an action against the city. In an action against said city for injuries occasioned by a defective sidewalk, in which the lot owner was joined, there was failure to plead and prove that plaintiff had exhausted her remedy against the lot owner. *Held*, that the action against the city could not be maintained, and it was not error to enter judgment in favor of the city.
2. In such action, no claim was made, either in the pleadings or upon the trial, that recovery was sought for an original faulty construction of the sidewalk, but the distinct claim was made from beginning to the end of the trial of failure to repair. The complaint was not amended. There was some slight testimony, which incidentally crept into the case, from which original faulty construction might be claimed. *Held*, that it was too late to make claim, for the first time in the supreme court, that the provisions of the charter of Fond du Lac (requiring exhaustion of remedy against lot owner before action against city could be maintained) did not apply to cases of original faulty construction.
3. [Whether under the charter of Fond du Lac (ch. 152, Laws of 1883), there is a different rule as to bringing actions against the city based on negligence occasioned by an original faulty construction of a sidewalk, from that occasioned by neglect to keep in repair, not decided.]

4. Where a wife is defending an action in a representative capacity, an objection to competency of her husband as a witness is not tenable.
5. In an action against a city and lot owner for personal injuries occasioned by lack of repair of a sidewalk, it is not error to exclude statements of a witness as to the condition of the walk at times which he was unable to locate as being anywhere near the time of the injury.
6. In such case, it is not error to exclude statements of a witness that the condition of the sidewalk was bad. Such statements are mere conclusions, and invade the province of the jury.
7. Where the findings of the jury exculpate the defendant from any liability, any error in the instructions to the jury on the subject of damages becomes immaterial.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an action to recover for injuries received by a fall upon a defective sidewalk upon a street in the defendant city. It appears that on the evening of October 3, 1898, the plaintiff, while walking upon the sidewalk, stepped into a hole in the walk, and was injured. The action was originally brought jointly against the city and one Reilly, who owned the adjoining real estate. Reilly having died before the trial of the action, the defendant *Mattie Sullivan,* as administratrix of his estate, was substituted in his place as a defendant. The defect charged in the complaint was that the sidewalk was insufficient, in that a plank had been removed therefrom, leaving a hole, into which the plaintiff stepped. The answer of both defendants denied any negligence, and the answer of the city also alleged that the city was not primarily liable for any such injury. The case was tried before a jury, and the following special verdict rendered:

"First Question. Between the hours of seven and eight o'clock p. m. on October 3, 1898, at the point specified in folio three of the complaint in this action, was there a hole or opening in the sidewalk, which made it defective and unsafe for public travel thereon? Answer (by the court, by consent of counsel). Yes. Second Question. At the time

and place specified in the first question, did the plaintiff step into a hole in the sidewalk, and in consequence thereof fall and receive injury thereby? Answer (by the court, by consent of counsel). Yes. If your answer to the second question be 'No,' then do not answer any of the following questions. But if your answer to the second question be 'Yes,' then answer each of the following questions: Third Question. Was the unsafe and defective condition of the sidewalk at the time and place in question caused by, or did it arise from, the default and negligence of the defendant city and of said Thomas Reilly? Answer. As to the city, we answer, 'No.' As to said Thomas Reilly, we answer, 'No.' Fourth Question. Was there any want of ordinary care on plaintiff's part which contributed to cause the injuries which she received? Answer. No. Fifth Question. Were the injuries which plaintiff received the natural and probable consequence of the unsafe and defective condition of the sidewalk at the time and place in question? Answer. Yes. Sixth Question. During how long a time prior to October 3, 1898, had said sidewalk been in such defective and unsafe condition at the place mentioned in the first question? Answer. No time. Seventh Question. From October 3, 1878, to and after October 3, 1898, was the said Thomas Reilly the owner in fee of the premises on which said sidewalk was placed, and which are described in folio three of said complaint? Answer. Yes. Eighth Question. Did said city, through its proper officers and its superintendent of sidewalks, and did said Thomas Reilly, have actual notice or knowledge of the unsafe and defective condition of said sidewalk in time to have caused it to be repaired, by using ordinary care and diligence, before plaintiff was injured? Answer. As to the city we answer, 'No.' As to Thomas Reilly, we answer, 'No.' Ninth Question. Had the unsafe and defective condition of the sidewalk existed for so long a time before October 3, 1898, that, by the exercise of ordinary care and diligence, said Thomas Reilly, and also said city, through its proper officers, should have discovered the condition of the sidewalk and repaired it before plaintiff was injured? Answer. As to the city, we answer, 'No.' As to Thomas Reilly, answer, 'No.' Tenth Question. On November 1, 1898, did plaintiff cause to be served on each of the defendants, and in

the manner stated in the complaint, a written notice and claim for damages, of which Exhibit A, attached to the complaint, is a true copy? Answer (by the court). Yes. Eleventh Question. Has plaintiff's said claim for damages been allowed, either in whole or in part, by said city? Answer (by the court). No. Twelfth Question. If the court shall be of the opinion that plaintiff is entitled to judgment in her favor, at what sum do you assess the damages which she has sustained by reason of her injuries? Answer. Nothing."

Upon this verdict judgment for the defendants was rendered, and the plaintiff appeals.

E. Blewett, for the appellant.

For the respondents there were briefs by *J. M. Gooding,* city attorney, for the respondent *City of Fond du Lac,* and by *Reilly, Williams & Reilly,* attorneys, and *D. D. Sutherland,* of counsel, for the respondent *Sullivan,* and oral argument by *Mr. Gooding* and *Mr. M. K. Reilly.*

WINSLOW, J. The judgment in favor of the city was unquestionably right. This court held in the case of *Devine v. Fond du Lac,* 113 Wis. 61, 88 N. W. 913, following *Henker v. Fond du Lac,* 71 Wis. 616, 38 N. W. 187, that, under the charter of the city, a party suffering injury by reason of a sidewalk being out of repair must exhaust his remedy against the lot owner, as a *condition precedent* to the right to maintain an action against the city. If the fact of the exhaustion of the remedy against the property owner be a condition precedent to the liability of the city, then, upon familiar principles, no cause of action is stated unless the complaint states the fact, and no cause of action is proven unless the fact appear in the evidence or is admitted, and the failure to plead and prove the fact may be taken advantage of at any time. It is not a case of bringing an action prematurely, but of bringing an action before a cause of action exists. It appeared in the present case that no judgment had been ob-

tained against the property owner; hence the action against the city could not be maintained. The plaintiff attempts to avoid the effect of the rule laid down in the *Devine Case* by the argument that the rule only applies to cases of injuries resulting from neglect to repair, and not to cases of original defective construction, and she claims that there was evidence in this case tending to show that the defect in the present case was in the original faulty condition of the walk. Whether there is in fact any difference in the two situations, under the charter provision, seems very doubtful, but the question is not involved here. The present case is one where the defect claimed in the complaint was specifically one of failure to keep in repair. The complaint was never amended, nor any claim made in the trial court in any manner that a recovery was sought on the ground of original faulty construction. It is too late to make the claim in this court for the first time.

As to the property owner, different questions arise. One John E. Sullivan, who is the husband of the defendant *Mattie E. Sullivan,* was sworn, and allowed to testify as a witness against objection, and it is claimed that this is error, on the ground that a husband may not testify for or against his wife, except when he has acted as her agent. The objection is not tenable, because the wife was defending in a representative capacity only. *Strong v. Stevens Point,* 62 Wis. 255, 22 N. W. 425.

It is claimed that the court erred in ruling out a part of the testimony of one Murphy, a witness on the part of the city, called to testify as to the general condition of the walk before and at about the time of the injury. Without stating the numerous rulings in detail, it may be said that the effect of them was simply to exclude statements by the witness as to the condition of the walk at times which he was unable to locate as being anywhere near the time of the injury, and general statements to the effect that its condition was bad.

All the statements of fact which he was able to make, relating to the condition at the time of the injury, were admitted. It is evident that there was no error in the rulings. It is not competent for a witness to state that the condition of a sidewalk was bad. This is a mere conclusion, and invades the province of the jury. It is not a question for experts to settle. Witnesses are to state the facts, and the jury draw the conclusion.

It is also claimed that the court erred because he submitted no question and gave no charge upon the question of the supposed original faulty condition of the walk. As has been before stated in this opinion, no claim was ever made, either in the pleadings or upon the trial, that a recovery was sought on this basis, but the distinct claim of failure to repair was made from beginning to end of the case. It does not suffice to raise a new issue of this kind in the case that some slight testimony incidentally crept in from which original faulty condition might be claimed. If it was desired to litigate this question, the complaint should have been amended, or at least attention should have been called to it in the trial court in some distinct manner, in order that the question might be tried in an orderly manner. Under the circumstances, it cannot be considered that the issue was ever made.

The objection that the verdict is against the clear preponderance of the evidence is also untenable. There was ample evidence to sustain the findings of the jury on the vital questions of the case.

Some exceptions are preserved to the charge on the subject of damages, but, as the findings of fact exculpate the defendants from any liability, the instructions on the subject of damages become immaterial.

By the Court.—Judgment affirmed.

THE EXCELSIOR WRAPPER COMPANY, Respondent, vs. MESSINGER, Appellant.

January 14—February 3, 1903.

Contracts: Construction: Ambiguity: Parol evidence: Mutuality.

1. A contract provided that one party would furnish the other "what . . . paper (same as has been furnished during the last twelve months)", at agreed prices, "to be taken as ordered." After part performance the seller refused further delivery, claiming that the contract only called for an amount equal to that delivered the previous year. The buyer insisted that the true construction of that part of the contract was, that the seller should furnish it with all the paper it might need in its business during the contract year. The buyer, after notice to the seller, followed by persistent refusal to furnish more paper at the agreed price, bought what paper it needed for the unexpired time in the open market, at a higher price, and brought action for its damages. On the trial it appeared, among other things, that the character of the buyer's business had been known to the seller for a number of years; that it had been customary for the two parties to contract in advance for the buyer's entire yearly consumption of certain kinds of paper; that the buyer, after the seller had commenced performance of the contract, persistently insisted on its interpretation of the contract, and right to any damages arising from any necessary extra cost in being compelled to buy elsewhere, and that to such position the seller offered no suggestion of denial or dissent until there had been ordered, and shipped, some 38,000 pounds more than the entire consumption of the previous year. *Held*, that the language of the contract was ambiguous, and that the evidence offered was competent and sufficient to sustain a finding that the parties, by the ambiguous expression quoted, agreed that the seller should furnish, at the prices specified, such paper as the buyer should need in its business during the contract year.
2. In such case, the expression in the contract, "to be taken as ordered," followed by the signature of the buyer, is an undertaking on the part of the buyer to take, at the price named, the quantity specified.
3. A contract was made by one having an established business, the character and magnitude of which was known to the other con-

tracting party, whereby the latter was to furnish the former with such an amount of goods as he might need in the ensuing year. *Held*, that such contract is not void for want of mutuality, since the quantity, though uncertain at the time of making the contract, is sure to become reasonably certain in the course of the year, and the buyer is bound to take, as the seller to furnish, such goods, of the quality designated, as should be needed in that business.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action for damages for breach of alleged contract by the defendant to sell to the plaintiff, upon the plaintiff's agreement to purchase the same, all the roll-rag paper needed to be used in the plaintiff's manufacturing business from the 1st day of September, 1899, to the first day of September, 1900, at the price of $1.47½ per 100 pounds, delivered at Sheboygan. The complaint alleged failure to deliver, after February 1, 1900, 199,510 pounds needed in its business, and demanded by the plaintiff, whereby it was obliged to purchase said paper elsewhere, at a price exceeding the contract price by $384.02, for which damages are prayed. The general facts disclosed by the evidence were that the plaintiff, for several years prior, had a contract with the defendant to furnish it all of its paper for each year at an agreed price; that in August, 1899, shortly before the expiration of such contract year, it was solicited by defendant's agent to renew contract for an ensuing year, and did so; all correspondence on this subject being in evidence, and showing clearly the purpose on both sides to make such contract. Thereupon the defendant prepared, of date August 28th, a writing to the following effect:

"An agreement between *W. D. Messinger & Co.*, of Chicago, Ill., party of the first part, and the *Excelsior Wrapping Co.*, of Sheboygan, Wis., party of the second part. . . . Party of the first part to furnish party of the second part what roll-rag paper (same as has been furnished during the

last 12 months) at $1.42½ per hundred lbs., f. o. b. Sheboygan, from Sept. 1st, 1899, to Sept. 1st, 1900, to be taken as ordered.

"EXCELSIOR WRAPPER CO.,
"By W. E. TALLMADGE, Manager.
"W. D. MESSINGER & CO.,
"Per G. H. RICHMOND, Agt."

Shipments as called for continued, with some delays not material to this action, until about February, when defendant repudiated responsibility to supply any more paper; claiming that the true construction of this agreement was to furnish only so much paper as had been furnished during the preceding year, which limit had then been exceeded. The court (jury having been waived) found that the written contract above mentioned is indefinite and uncertain; that before the execution thereof both parties intended to make a valid contract for a year's supply of paper; that after its execution both parties treated it as a valid contract for a year's supply of paper; that defendant complied with it up to about the middle of January, 1900, and then refused to sell and deliver any more; that, previous to the time of such refusal, defendant had received an order for paper to supply plaintiff's factory for the remainder of the term; that, after notice that it would do so, plaintiff purchased paper in the open market, for no more than its needs, at a necessary increase in price of $384.02. As conclusion of law, the court found that the contract entered into between the parties was a valid and legal contract for the purchase and sale of all the paper needed in plaintiff's manufacturing business from September 1, 1899, to September 1, 1900, and accordingly rendered judgment in favor of the plaintiff and against the defendant for $384.02, from which defendant appeals.

For the appellant the cause was submitted on the brief of *Francis Williams.*

A. C. Prescott, for the respondent.

DODGE, J. There is but one controverted question of fact in this case, and that is, What meaning had the parties in using the expression contained in the contract of August 28, 1899, "what roll-rag paper (same as has been furnished during the last 12 months)"? That the expression is ambiguous and requires explanation is, of course, obvious at a glance; hence extrinsic evidence was admissible to aid the court in its interpretation; such evidence being, however, confined within certain restrictions. Obviously, by the reference to the preceding year, it became admissible to show what had been done between the parties that year; and it appeared without dispute that there had been a contract between them for the furnishing of paper of this description, of specified weight and quality, to the amount necessary in plaintiff's business, at the price of $1.42½ per 100 pounds, to be shipped by the defendant and received by the plaintiff as the latter might from time to time order during that year. Three constructions are suggested: First (that of the plaintiff), that all of these terms and specifications of the previous year's contract were by these words embodied in the contract sued on. Defendant's counsel suggests that the words "same as has been furnished" refer only to the weight and quality, while defendant himself, in correspondence, finally contended that they signified the same number of pounds as furnished the preceding year. The court below, as a deduction from all of the evidence, has adopted the plaintiff's construction. The evidence, besides proof of what the previous contract had been, consisted of three or four letters from defendant and his agent to plaintiff, and from plaintiff to him, showing that the parties met upon a purpose of providing by contract for plaintiff's needs of that class of paper for the ensuing year, in contemplation of the probability that prices would be higher, and of the fact that defendant needed to have a binding contract with plaintiff before he could safely give his order to the paper mills; that both parties, with such

contemplation, assented to a renewal for another year of the contract then existing between them. Such assent doubtless might have constituted a contract, of which the letters constituted complete evidence, had the parties not proceeded thereafter to reduce to more formal shape and to sign the writing of August 28 as evidence of the contract between them; including therein a further element with reference to another kind of paper, as to which no definite agreement had been reached until this instrument was executed. It further appeared that the character of plaintiff's business had been known to the defendant for a number of years, and it had been customary for defendant and plaintiff to contract in advance for the plaintiff's entire consumption of certain kinds of paper. As to this class of extrinsic or parol evidence of acts, conduct, or communications, preceding the execution of a formal contract, many decisions appear in our own Reports, and the lines of demarcation are reasonably certain. While it is not permissible to offer extrinsic evidence of the terms of the agreement,—of what one party or the other promised,—to vary, defeat, or add any term in a written contract, it is permissible, in case of ambiguity, to introduce evidence to ascertain the subject-matter with reference to which parties proceeded to negotiate and contract, and their situation and surrounding circumstances, so that the court may stand in substantially the same light in reading the words of the contract as did the parties when adopting those words. *Nash v. Towne,* 5 Wall. 689; *Minnesota L. Co. v. Whitebreast C. Co.* 160 Ill. 85, 43 N. E. 774; *Sigerson v. Cushing,* 14 Wis. 527; *Nilson v. Morse,* 52 Wis. 240, 9 N. W. 1; *Walsh v. Myers,* 92 Wis. 397, 66 N. W. 250; *Brittingham & H. L. Co. v. Manson,* 108 Wis. 221, 84 N. W. 183; *Rib River L. Co. v. Ogilvie,* 113 Wis. 482, 89 N. W. 483. These authorities refute the contention that in no case can be admissible any communications between the parties at or prior to the execution of the written contract. So far as

such communications, verbal or written, serve merely to establish the situation or surroundings, they differ not at all from other evidence of the same facts. So far, however, as they relate to the terms of agreement between the parties, they cannot be received. The writing must be taken as their final expression. 1 Greenl. Ev. §§ 286, 288; *Steele v. Schricker,* 55 Wis. 134, 143, 12 N. W. 396; *Boden v. Maher,* 105 Wis. 539, 81 N. W. 661.

Another class of evidence which was offered in much volume was the subsequent dealings and correspondence of the parties under this contact, whence it appeared that persistently, from some time in October onward, the plaintiff categorically and unequivocally declared its understanding that the contract entitled it to all the paper which its business demanded, and that, if that were not furnished, it had the right to charge defendant for any necessary extra cost in buying elsewhere. To the declaration of this claim, defendant offered no suggestion of denial or dissent until after there had been ordered and shipped some 38,000 pounds more than the entire consumption of the previous year, nor until some time in February, when, upon the claim that he had already shipped more than the entire shipments of the previous year, and therefore more than the contract amount, he refused to fill orders except at a higher price. The efficacy of declarations and conduct of parties to give practical construction to ambiguous expressions in their contracts has been often recognized, and, in a doubtful case, may well turn the scale in one direction or the other. *Hosmer v. McDonald,* 80 Wis. 54, 61, 49 N. W. 112; *Janesville Cotton Mills v. Ford,* 82 Wis. 416, 430, 52 N. W. 764; *Walsh v. Myers,* 92 Wis. 401, 66 N. W. 250. We think this evidence entirely sufficient to sustain the conclusion of the circuit court that the parties intended, by the ambiguous expression above quoted, to declare their agreement that the defendant should furnish, at the price specified, such roll-rag paper as the

plaintiff should need in its business from September 1, 1899, to September 1, 1900.

2. But appellant further contends that even, if this construction be given to the words of the contract, it still is not binding upon the defendant, for want of mutuality—First, because, as he asserts, it contains no undertaking whatever on the plaintiff's part; and, secondly, because, if bound, the contract only requires the plaintiff to take such paper as it chooses, and it might, within its terms, refuse to take any. The first of these grounds of asserted want of mutuality, we think, is wholly contradicted by the very words of the writing, which closes with the expression, "to be taken as ordered," followed by the signature of the plaintiff. This we have no hesitation in construing to be an undertaking on the part of the plaintiff to take, at the price named, the quantity specified. We therefore do not find it necessary to discuss whether an obligation so to do would be implied from the mere signature of a document declaring nothing but the duty of the other party, in analogy to the implication which has been held to arise from a mere "acceptance" of such an undertaking. *Shadbolt & B. I. Co. v. Topliff,* 85 Wis. 513, 55 N. W. 854; *McCall Co. v. Icks,* 107 Wis. 233, 236, 83 N. W. 300. The latter contention presents a question fruitful of many decisions by courts; the earlier of them tending generally to the view that, where the agreement of one party was to furnish only that which the other party should desire or order or need, there was entire freedom from obligation on the part of the latter, and therefore no mutuality. The principle of these cases has been very lately declared in this court, in *Hoffman v. Maffioli,* 104 Wis. 630, 80 N. W. 1032; *Teipel v. Meyer,* 106 Wis. 41, 81 N. W. 982. In later times courts have fully recognized, however, that when the discretion, wants, or needs of a party are referred to an existing situation, such as an established business or a known enterprise, and intended to be controlled thereby, there becomes

added a measure of certainty sufficient to give to the contract mutuality. Thus, an agreement to carry all coal which the other party might desire to have carried in a given period, while wholly uncertain if the other party has no coal and is engaged in no business or enterprise to regulate his desire to ship, is reasonably certain in the case of a mine owner, the product of whose mines will regulate the quantity which he will need, and therefore be likely to desire, to ship, if the construction be adopted that his option is to be controlled by the course of such business. The underlying principle of this distinction was expressed in *McCall Co. v. Icks,* 107 Wis. 233, 83 N. W. 300, where the defendant agreed to buy a specified number of all dress patterns which the plaintiff should issue. It being made to appear that the plaintiff was in the business of manufacturing and issuing patterns of various descriptions as the market needs required, it was held that the conduct of the plaintiff's business, although prospective, would give a sufficient measure of certainty as to the number agreed to be purchased to make the contract valid and binding upon both parties. Other illustrative cases are *Wells v. Alexandre,* 130 N. Y. 642, 29 N. E. 142; *Minnesota Lumber Co. v. Whitebreast Coal Co.* 160 Ill. 85, 43 N. E. 774; *Parker v. Pettit,* 43 N. J. Law, 512; *Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co.* 114 Fed. 77; *Hickey v. O'Brien,* 123 Mich. 611, 82 N. W. 241; *Boden v. Maher,* 105 Wis. 539, 81 N. W. 661; *McCall Co. v. Icks, supra.* The situation presented in the instant case falls clearly within the principle of the later decisions. The plaintiff had an established business, of character and magnitude well known to the defendant. It could not, with profit to itself, seriously modify the volume of that business for the mere purpose of increasing or diminishing the amount of any given class of supplies. The exact quantity of paper, therefore, which it would want or need in that business during a prospective year, while uncertain at the time of the

making of the contract, was sure to become reasonably certain in the course of the year; and the contract was not merely an optional one with the plaintiff, but bound it as well to take, as it did the defendant to furnish, such paper, of the quality designated, as should be needed for that business. This, under the authorities above cited, constitutes sufficient mutuality to give full validity to the contract, and make either party liable to the other for its breach.

The foregoing disposes of all the grounds of error assigned by appellant. The competent evidence, even if some of doubtful competency was admitted, fully supported the construction given by the trial court to the ambiguous words used in the written contract, which upon that construction became certain and mutual. The breach of the contract as so construed, and the damage thereby caused to plaintiff, are not controverted. The judgment was right.

By the Court.—Judgment affirmed.

WARBURTON, Administrator, Appellant, vs. WILLIAMS, Administrator, Respondent.

January 14—February 3, 1903.

Wills: Construction: Rights of beneficiary: Estates of decedents: Claim for support.

1. A testator expressly charged his estate with the support of his son Henry "during his natural life," and expressly provided that in case said son survived his mother, and remained unmarried, as he did, "all of his real and personal estate remaining" should go to his said son "during his natural life, for his said Henry's support," and at his death to be divided equally between the testator's "legal surviving heirs, share and share alike." *Held*, that said son Henry, by virtue of such provision of the will, had the absolute right to such support out of his father's estate, independently of any contract with any one authorized to represent the estate.

2. In such case, the rights of the testator's heirs in his estate are subject and subordinate to Henry's right to support.

3. Plaintiff, a grandson of said testator, and nephew of Henry, after the death of testator's widow, furnished said Henry with his support, etc. On the death of Henry, plaintiff was appointed administrator of Henry's estate and filed his claim therein for such support, and, on its allowance, filed it against testator's estate. *Held*, that plaintiff was entitled to reasonable compensation out of the estate of testator for the support so furnished.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

It appears from the records and is undisputed: That Frederick Relfe died November 22, 1887, leaving a last will and testament, which was admitted to probate January 17, 1888, and which contained, among other things, the following provisions:

"I give and bequeath unto my beloved wife, Sarah, during her natural life, all my estate, both real and personal, of which I may die possessed, with full power to sell, convey, and dispose of all and any of said property and invest and reinvest the proceeds thereof as to her may seem best for the comfort and support of herself and our son Henry B., *whose support during his natural life is herewith charged against said estate* until the death of said Henry B., unless he, said Henry B., shall hereafter marry, in which latter case said Henry B. shall be placed upon the same footing as my other children to a share in my said estate, and if my son Henry B. shall survive my said wife, and be unmarried, all of said real and personal estate remaining shall *go to said son Henry B. during his natural life,* for his, said Henry's support, and at his death, if he be then unmarried, the remainder of said estate to be divided equally between my legal surviving heirs, share and share alike, and to the living heirs of my immediate heirs, as the case may be. . . . Said estate subject to all my just debts, and the expense of my last sickness and funeral and burial. And furthermore all transfers, sales, and conveyances to be made by my said wife as aforesaid, amounting to the sum of twenty-five dol-

lars or upwards, at any one time, shall be first approved by the executor hereinafter named, except, of course, such property as by law becomes the property of a widow absolutely."

Therein he named his son Thomas as sole executor of his last will and testament. At the time of his death, Frederick Relfe left him surviving his widow, Sarah, and seven children, to wit, Henry B., Thomas, Otto, Sarah (mother of the plaintiff), Fred, Mary, and Jane. Thomas, so named as executor, failed to qualify, and the defendant *Francis Williams* was appointed administrator with the will annexed, in his place. The widow provided for the comfort and support of said Henry B. during her life, as provided in the will. Henry B. died March 3, 1899, without ever having any children or being married. Upon the death of the widow. and from March 26, 1895, to March 3, 1899, Henry B. resided with, and was kept, cared for, and boarded by, the plaintiff. Upon the death of Henry B. the plaintiff was appointed the administrator of his estate, and as such filed a claim against the estate of Henry B., deceased, for the support so furnished by him, and the same was allowed against the estate of said Henry B. Thereupon the plaintiff, as such administrator, filed such claim so allowed against the estate of Frederick Relfe, deceased, the same was disallowed by the county court, and upon appeal from the judgment of such disallowance the same was disallowed by the circuit court, where the judgment of the county court was affirmed. From the judgment entered thereon accordingly, the plaintiff brings this appeal.

The cause was submitted for the appellant on the brief of *A. C. Shaw,* and for the respondent on that of *Francis Williams, in persona.*

CASSODAY, C. J. The plaintiff was the grandson of Frederick Relfe, deceased, and the nephew of his intestate, Henry B. Relfe. The latter was seemingly unable to care for him-

self, and so was provided for in his father's will. The plaintiff's grandmother had during her life cared for and supported Henry B. as directed in her husband's will. Upon her death the plaintiff, apparently relying upon assurance of some of his uncles and aunts and mother that the estate of his grandfather was charged with the support of his uncle Henry B., took him to his own home, and there furnished him with support and maintenance during the balance of his life. Some of his uncles and aunts made some small payments on account of such support, but after the death of Henry B. such obligations to pay were repudiated, and some of them denied the liability of the estate. The court found that neither the plaintiff nor his intestate had ever contracted with that estate, or with any one authorized to bind that estate, for such support, and for that reason disallowed the claim of the plaintiff for such support. The testator, Frederick Relfe, had expressly charged his estate with the support of Henry B. "during his natural life," and expressly provided that in case Henry B. survived his mother, and remained unmarried, as he did, "all of said real and personal estate remaining" shall go to his "son Henry B. during his natural life, for his said Henry's support, and at his death . . . be divided equally between" the testator's "legal surviving heirs, share and share alike." Henry B., by virtue of such provisions of the will, had the absolute right to such support out of such estate, independently of any contract with any one authorized to represent the estate. The right of the children of the testator in such estate was necessarily subject and subordinate to such right of support so expressly provided for. The ruling of the trial court in effect modifies the provisions of the will mentioned, and gives the entire estate to the testator's children, freed from such charge for support. The plaintiff, the grandson of the testator, furnished the support thus secured by the will. His equitable right to the same out of the estate is certainly superior to the rights of those who took

the estate subject to such charge. If authorities are wanted to so plain a proposition, they may be found in the decisions of this court, as well as other courts. A few are cited: *Batchelder v. Batchelder,* 20 Wis. 452; *In re Goodrich's Estate,* 38 Wis. 492; *Knox v. Knox,* 59 Wis. 172, 18 N. W. 155; *Jones v. Jones,* 66 Wis. 310, 28 N. W. 177; *Burnham v. Norton,* 100 Wis. 8, 75 N. W. 304; *Derse v. Derse,* 103 Wis. 113, 79 N. W. 44; *Swarthout v. Swarthout,* 111 Wis. 102, 86 N. W. 558. Thus in one of the cases cited the will provided that the testator's wife should " 'have a home and good support as long as she lives on the home premises, board and clothing, money for reasonable expenses, or, at her option, $200 per year while she remains my widow, and $100 thereafter during her natural life.' *Held,* that the intention here manifested is that the home farm shall be primarily chargeable with the maintenance of the widow." *Estate of Goodrich, supra.* We must hold that the plaintiff is entitled to reasonable compensation for the support so furnished out of the estate of Frederick Relfe, deceased, and that the trial court and the county court improperly rejected the same.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded, with directions to reverse the judgment of the county court, and for further proceedings in accordance with this opinion.

MADDEN, Respondent, vs. KINNEY and others, Appellants.
SAME, Appellant, vs. SWEET and others, Respondents.

January 14, 15—February 3, 1903.

Schools and school districts: Board of education: Power to contract for text books: City charter: Common council: Statutes: Pleading: Injunction: Appeal and error: Res adjudicata: ***Parties.***

1. Sec. 514, R. S. 1878, declared that the several boards of education in cities should determine what school books should be used, and that any such board might be authorized by the

board of aldermen, common council, or trustees to purchase text books for use in the public schools. Sec. 515 declared that such board should be charged with all the duties imposed on school district boards, so far as they were not expressly provided for or limited by special provisions of the act of incorporation, or other act under which such body was constituted, and that every city not having a system of school government specially provided by law should be governed by the provisions of ch. 27, R. S. 1878. Sec. 514 was amended at various times and, as amended by ch. 308, Laws of 1891, was, as sec. 440*a*, re-enacted *verbatim* as part of the codification of the school laws of 1897 (ch. 354, Laws of 1897), and is now sec. 440*a*, Stats. 1898. Sec. 515 was dropped out of the codification of 1897, but less than four months thereafter was literally re-enacted by the same legislature, and is now sec. 515, Stats. 1898. The charter of Fond du Lac (sec. 10, subch. XV, ch. 153, Laws of 1883) provides that the board of education "shall establish the text books to be used" in that city. Sec. 4986, Stats. 1898, provides that the laws contained in the Revised Statutes shall apply to and be in force in each city in the state, as far as the same are applicable *and not inconsistent with the charter of any such city*, but that when the provisions of any such charter are at variance with the provisions of the Revised Statutes, the provisions of *such charter shall* prevail unless a different intention is plainly manifested. *Held:*

(1) That neither sec. 514, as it existed in the Revised Statutes of 1878, nor as modified and finally reduced to the form expressed in sec. 440*a*, Stats. 1898, took away any of the powers granted by ch. 153, Laws of 1883, to the board of education of the city of Fond du Lac.

(2) That such board of education had the power to make an order for furnishing text books in the public schools of Fond du Lac, binding upon the tax payers and patrons of its schools for the term of five years, without the approval of the common council.

(3) That such board of education having such power, in an action to restrain the execution of such an order, allegations of the complaint as to inexpediency, impropriety, and bad motives of certain members of the board are of no significance.

2. Under the charter of Fond du Lac (ch. 152, Laws of 1883), the board of education has the power to establish the text books to be used in such city, and, acting under that power, such board adopted certain text books "as the regular text-books" in the branches thereby covered "in the city schools of Fond du Lac for the next five years" then following, and entered

into a five-year contract with the publishers to furnish to purchasers the latest edition thereof at certain enumerated prices. In an action to restrain the consummation of such contract, the complaint, in addition to setting forth the facts as to the contract, contained numerous allegations of undue influence brought to bear upon certain members of the board, and bad motives on their part in the action taken. A preliminary injunction was granted which the court refused to dissolve. *Held*, that the complaint failed to state a cause of action for an injunction, or any equitable relief, and the injunction was improperly granted and improperly continued.

3. Where a trial court refuses to dissolve an injunction such ruling is not *res adjudicata* on appeal.
4. Where a board of education is a mere agency or instrumentality of the city government, and, as such, incapable of being sued, it is not, as such, a necessary party to an action to enjoin the consummation of an order of such board changing the school books to be used in the city schools.

APPEALS from orders of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *One order affirmed; the other reversed.*

In this case the plaintiff appeals from each of two orders sustaining two separate demurrers to the complaint entered January 6, 1902, and the defendants named appeal from an order refusing to dissolve the preliminary injunction and continuing the same in force, made October 19, 1901. It appears from the complaint, and is undisputed, that July 30, 1901, Ginn & Co. submitted a proposition in writing to the board of education of the city of Fond du Lac to the effect that, in consideration of the adoption by the board "for the term of five years" of the list of text-books therein named, they thereby agreed to supply the same in the latest editions at the prices therein named; and would also exchange dealers' stock of new books of the kind then in use on the basis of dollar's worth for dollar's worth, list prices, transportation free on introductory exchange supplies. On the same day the board of education resolved, in effect, that such text-books "be adopted and used as the regular text-books" in the

branches therein named "in the city schools of Fond du Lac for the next five years" then following. The complaint contains numerous allegations of undue influence brought to bear upon certain members of the board, and bad motives on their part in the action taken.

For the plaintiff the cause was submitted on the brief of *Edward S. Bragg.*

J. M. Gooding, attorney, and *D. D. Sutherland,* of counsel, for defendants.

CASSODAY, C. J. The important question in the case is as to whether the board of education had the power to make a contract for furnishing text-books in the public schools, binding upon the plaintiff and other citizens and taxpayers and patrons of the school for the term of five years, without the approval of the common council of the city. This is the principal question involved in both appeals, and its determination necessarily depends upon the construction to be given to certain portions of the statutes. The defendants claim that the board had such power, and rely upon the provisions of the city charter. Subch. XV, ch. 152, Laws of 1883. That subchapter contains seventeen sections, and is entitled "Department of Education." The tenth section of that subchapter expressly provided:

"The board of education shall, from time to time, make such rules and regulations for the government and organization of schools, for the reception and instruction of pupils, and their transfer from one school to another, and for the promotion and good order and discipline in schools, as to it shall seem expedient, and also for the care and management of the several school rooms, fixtures, furniture, and apparatus in the city, *and shall establish the text books to be used therein.*"

At the time that subchapter was enacted, ch. 27, R. S. 1878, entitled, "Of Common Schools," was in force, with amendments as to certain sections. That chapter contained

one hundred and forty-one sections, being sections 412 to 553, inclusive. Sec. 514 of that chapter declared:

"The several boards of education, or other bodies having the government in cities or incorporated villages of the public schools, shall determine what school and text books shall be used in the several branches of study pursued in the schools, and shall make a list of such books, file a copy with their clerk or secretary and keep a copy publicly posted in each school building. When any such text books shall have been adopted, they shall not be changed for the term of three years, nor thereafter without the consent of the state superintendent. Any such board may be authorized by the board of aldermen, common council or trustees, to purchase text books for use in the public schools, and to loan or furnish them to pupils under such conditions or regulations as they may prescribe."

And sec. 515 declared:

"Every such board or other body aforesaid shall have all the powers, and be charged with all the duties imposed by these statutes on school district boards, so far as the same are not provided for or limited by the special provisions of the act of incorporation, or other act under which such board or body is constituted. Every city or village not having a system of school government specially provided by law therefor, shall be governed by the provisions of this chapter."

A few days after such adoption of the city charter of Fond du Lac, the same legislature amended sec. 514 by dropping out the words "or incorporated villages," and also dropping out the clause requiring "the consent of the state superintendent" to the change of text-books, and all the balance of the section; and in lieu thereof declared:

"Any board of education in any city where the district system is not in force, may, under the limitations of this act, order changes in text books: provided that said changes shall be approved by the common council or board of aldermen of such city, and the aforesaid boards of education are hereby authorized to purchase text books for use in the public schools, and to loan or furnish them to pupils under such con-

ditions or regulations as they may prescribe. But no text books shall be permitted in any free public schools which would have a tendency to inculcate sectarian ideas." Sec. 3, ch. 251, Laws of 1883.

March 19, 1891, sec. 5, subch. XV, of the city charter of Fond du Lac (ch. 152, Laws of 1883), was amended by adding a new subdivision, as follows:

"(5) To construct suitable new school buildings and equip the same, and buy school sites with necessary grounds therefor, but only by and with the consent and concurrence of the common council," with a clause against the expenditure of money without being "previously appropriated by the common council." Sec. 6, ch. 25, Laws of 1891.

But no attempt was made therein to otherwise change any of the provisions of subch. XV of the charter. A few weeks afterwards the same legislature amended sec. 514 as amended by sec. 3, ch. 251, Laws of 1883, so as to require the list of text-books to be *"publicly"* posted, and excepting out from the provisions "such city or cities as furnish to the pupils attending the public schools therein free text books," but otherwise left the section substantially as it was before. Sec. 2, ch. 308, Laws of 1891. All such legislation was prior to the amendment to the constitution which prohibits the legislature "from enacting any special or private law . . . for amending the charter of any city." Sec. 31, art. IV, Const. Ch. 27, R. S. 1878, entitled "Of Common Schools," was amended, codified, and revised by ch. 354, Laws of 1897, and sec. 514, as amended by sec. 2, ch. 308, Laws of 1891, was re-enacted *verbatim,* but as No. 440*a*, and placed in a different connection, instead of being continued as sec. 514, and hence that number was dropped out of such codification; and so was sec. 515, R. S. of 1878, quoted above, and which had continued in force and unchanged down to the time of such codification, May 4, 1897. Apparently sec. 515 was so dropped out of such codification by mistake, since the same legislature at an adjourned session thereof, less than four

months thereafter, re-enacted the same literally (sec. 515, ch. 380, p. 998, Laws of 1897); and the same has since been continued as sec. 515, Stats. 1898. Thus it appears that sec. 514 of the Revised Statutes of 1878, with slight amendments, continued down to May 1, 1891, and since that time it has continued the same, as therein expressed, down to the present time, either by that number or as sec. 440*a*. With sec. 514 in force as indicated, the special charter of the city of Fond du Lac was adopted March 26, 1883, with a subchapter entitled "Department of Education," as mentioned. A few days afterwards the same legislature amended sec. 514 as indicated, apparently without any intention of changing any of the provisions of such special charter. So, as indicated, the legislature of 1891 amended such special charter by adding a clause, and then a few weeks afterwards amended sec. 514, as mentioned, without indicating any purpose of taking away any of the powers thus granted to the board of education of the city of Fond du Lac by such special charter. This is also manifest from the fact that during the last twenty-four years, with the short interval mentioned, sec. 515, quoted above, has all the time been in force. To that section must be applied the well-known maxim, *"Expressio unius est exclusio alterius." State ex rel. New Richmond v. Davidson,* 114 Wis. 578, 90 N. W. 1067, and cases there cited. When so applied, the section declares, in effect, that the powers and duties of boards of education as prescribed by the general statutes shall not apply to any city or village "having a system of school government specially provided by law therefor." Another section of the statutes provides:

"All the laws contained in these Revised Statutes shall apply to and be in force in each and every city and village in the state as far as the same are applicable *and not inconsistent with the charter of any such city* or village; but when the provisions of any such charters are at variance with the provisions of these Revised Statutes, the provisions of *such*

charters shall prevail unless a different intention be plainly manifested." Sec. 4986, R. S. 1878, and sec. 4986, Stats. 1898.

The next section provides

"None of the general provisions of these Revised Statutes shall be construed so as to effect or repeal the provisions of *any special acts* relating to particular counties, towns, *cities* or villages or the officers or offices thereof unless such special acts are enumerated in the acts hereby repealed." Sec. 4987, R. S. 1878, and sec. 4987, Stats. 1898.

These sections have frequently been construed as keeping cities under special charters from being affected by the general statutes. *Baines v. Janesville,* 100 Wis. 369, 375, 75 N. W. 404, and cases there cited; *Harris v. Fond du Lac,* 104 Wis. 44, 80 N. W. 66. Nor is the rule frustrated by the fact that sec. 514, as it formerly existed, was amended, and finally placed in another portion of the statutes as sec. 440*a,* as mentioned. The statutory rule of construction in case of such displacement is:

"The provisions of these Revised Statutes, so far as they are the same in substance as those of existing laws, shall be construed as a continuation of such laws and not as new enactments." Sec. 4985.

Of course, "one legislature has no power to bind a subsequent legislature as to the form of expression to be used in repealing or modifying a prior statute." *Baines v. Janesville,* 100 Wis. 369, 75 N. W. 404. But the intention of the legislature must be ascertained from the language employed, and not from a supposed intention not expressed. We must hold that neither sec. 514, as it existed in the Revised Statutes of 1878, nor as modified and finally reduced to the form expressed in sec. 440*a,* Stats. 1898, took away any of the powers granted to the board of education of the city of Fond du Lac by the subchapter of its charter entitled "Department of Education," as amended.

The board of education having the power and right in its

discretion to "establish the text-books to be used" in the city, the allegations of the complaint as to inexpediency, impropriety, and bad motives of certain members of the board are of no significance. *State ex rel. Rose v. Superior Court of Milwaukee Co.* 105 Wis. 677, 81 N. W. 1046; *Metzger v. Hochrein,* 107 Wis. 267, 270, 83 N. W. 308; *Marshfield L. & L. Co. v. John Week Lumber Co.* 108 Wis. 274, 275, 84 N. W. 434. We must hold that the preliminary injunction was improperly granted, and was improperly continued. For the same reasons we must hold that the complaint fails to state a cause of action for an injunction, or any equitable relief. Clearly, the ruling of the trial court upon that question is not *res adjudicata* on this appeal. *Hackett v. Carter,* 38 Wis. 394; *Watson v. Appleton,* 62 Wis. 267, 22 N. W. 475; *Schoenleber v. Burkhardt,* 94 Wis. 575, 69 N. W. 343.

2. Counsel for the defendants contend, and the trial court held, that there was a defect of parties defendant by the failure to make the board of education, as such, a party to the action. But, as argued in behalf of the plaintiff, the board was a mere agency or instrumentality of the city government, and as such, incapable of being sued, and hence not a necessary party to the action. *Klaus v. Green Bay,* 34 Wis. 628; *Gardner v. New York,* 10 N. Y. 409.

By the Court.—The order of the circuit court sustaining the demurrer is affirmed, but only on the ground that the complaint states no cause of action; and the order of the circuit court refusing to dissolve the preliminary injunction and continuing the same is reversed, and the cause is remanded for further proceedings according to law.

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SMITH and others, Respondents, vs. SMITH, imp., Appellant.

January 15—February 3, 1903.

Deeds: Presumption as to delivery from having been recorded: Wills: Construction: Vested remainder.

1. It appeared from the testimony that a deed, which had been recorded, had been executed after the grantor had been sued; that he had stated that he deeded the land to defeat any judgment that might be recovered; that the grantee paid no consideration for the conveyance, and had no knowledge of its execution or of the fact that it was placed on record, which was done by the grantor, until some time thereafter, and there was evidence tending to show that the deed never was in possession of the grantee. *Held*, that such facts were sufficient to rebut the *prima facie* presumption of delivery arising from the recording of the deed.
2. Testator devised a life estate in all his property to his wife so long as she remained his widow, and, at her death, directed that the property be equally divided between four of his children. The third clause of the will provided that, if the wife should marry, the property should be sold, and, after paying his wife certain bequests, the remainder should be divided among the same four children. The will also declared that no other person or persons, except those mentioned, should have any share in the property, and that he had previously given to his other children all he intended them to have. *Held*, that under sec. 2037, R. S. 1878 (providing that future estates in land are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or preceding estate; and contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain), the interests of the four children mentioned vested at once on the death of the testator.

APPEAL from a judgment of the circuit court for Richland county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

This is an action in equity brought by the widow and minor children of one Anson L. Smith, deceased, to cancel a certain deed to real estate executed by the said Anson L. Smith and the plaintiff *Ora*, his wife, running to one A. M. Smith, which deed is alleged to have been without considera-

tion, and never to have been delivered. It appeared that the land in question was originally owned by one Matthew R. Smith, who died in the year 1881, leaving, him surviving, a widow, named Catherine, who was his second wife, and four children by said second wife, viz., Lena Leota, Anson La Rose (husband of plaintiff *Ora*), Alva Matthew (being the same person named in the deed as A. M. Smith), and the appellant, *Chloran D. J. Smith.* He also left a number of children by his previous marriage, whose names are not necessary to be stated. Catherine, his widow, had also been married before her marriage to Matthew, and had several children by such marriage. Matthew R. Smith left a will, which was duly probated, the provisions of which, so far as material in this case, are as follows:

"(2) I will and bequeath to my wife, Catherine Smith, all my property, personal, real estate, mortgages, bonds, notes, and all moneys over and above my debts, for her to use to the best of her knowledge and ability for herself and the four children left in her care as long as she lives, if she remains my widow, and at the time of her death to be equally divided between these four children, Lena Leota Smith, Anson La Rose Smith, Matthew Alva Clark Smith, *Chloran Delvan J. Smith.* (3) But if my wife, Catherine Smith, marries again, then the property above described shall be sold. Out of this I will give her five hundred dollars in cash, notes, or bonds, according to her wish. I will her the choice of the cows, or the value of one, and all her beds and bedding. I also will that the remaining value of the property shall be paid in four payments; Lena Leota Smith to receive her payment first, which shall constitute one-fourth of the remaining property; Anson La Rose Smith to receive the second payment; Matthew Alva Clark Smith to receive the third payment; *Chloran Delvan J. Smith,* the fourth and last payment. . . . (6) I also will that there are not any person or persons besides those before mentioned to have any share or portion of the said property. To all of my other children I have before this given all of my property that I intend for them to have.

"M. R. Smith. [Seal.]"

It further appears that Lena L. died intestate and unmarried in the year 1893. Anson L. died intestate August 3, 1896, leaving the plaintiff *Ora,* his widow, and the remaining plaintiffs, his children and only heirs at law. Alva Matthew died intestate and unmarried August 3, 1897; thus leaving the appellant, *Chloran,* the only survivor of the four children. It also appears that Catherine, the widow, died September 4, 1899. On the 5th of March, 1896, the deed in question was duly executed, witnessed, and acknowledged by Anson L. and *Ora Smith.* It purported to convey to A. M. Smith the undivided one-third of the land in question, subject to the homestead and dower interest of Catherine, and it recites a consideration of $2,600. It was duly recorded upon the day of its execution. All of the foregoing facts are undisputed, and are found by the court to be true; the only fact in serious dispute being the question whether the deed was ever delivered. Upon this question *Ora* testified that the deed was made at a bank in Richland Center, in this state, at about nine o'clock in the morning on the day of its date; that A. M. Smith was not present at the time of the execution, and that no money was paid by any one at that time; that her husband, Anson, then took it, and after about half an hour brought it home to her; and that she has had it ever since; and that she knew that A. M. Smith was not in town that morning. One Pease testified that he was present when the deed was made, and that no one was there except Anson and his wife, and that no money was paid. There was some additional testimony by various witnesses of declarations made by A. M. Smith after the execution of the deed and after Anson's death, to the effect that he knew nothing about the making of the deed, and that it did not cost him anything; that he never saw it, and did not think it had left *Ora's* hands; that he claimed nothing by it, and calculated to let Anson's children have the same as the rest of "us;" that it was Anson's fault, and he never saw the deed, nor had any-

thing to do with it. On the part of the defendant one witness testified to conversations with Anson in which Anson said that he had sold or deeded the land to Alva to defeat any judgment which might be rendered against him in a lawsuit then pending. Another witness testified that A. M. Smith was in Richland Center on the day the deed was executed, and that A. M. afterwards told him that he had bought the place. Another testified that Alva said he had the deed of Anson's share in the estate. The court found that the deed was never, in fact, delivered, and that no consideration was paid therefor, and that Anson owned the undivided fourth of said land at the time of his death, and that the deed in question should be canceled. There were a number of defendants, including the children of Catherine by her first marriage, when the action was originally brought; but prior to the trial all the defendants save the defendant *Chloran* withdrew their answers, and the action was discontinued as to them. Judgment was rendered for the plaintiffs, establishing their title to one-fourth of the land in question, and canceling said deed, from which judgment the defendant *Chloran* appeals.

For the appellant there was a brief by *L. H. Bancroft* and *H. W. Chynoweth,* and oral argument by *Vroman Mason.*

For the respondents there was a brief by *W. S. McCorkle,* attorney, and *R. M. Bashford,* of counsel, and oral argument by *Mr. McCorkle.*

WINSLOW, J. The appellant makes two contentions: (1) That the finding that the deed was never delivered is not supported by the evidence; and (2) that the court erred in finding that Anson La Rose Smith had any title to or interest in the land when the deed was made.

1. The defendant is doubtless right in his claim that the fact that a deed is duly recorded is *prima facie* evidence of its due delivery. 1 Devl. Deeds (2d ed.) § 292. But this is

a presumption of fact, merely, which may be rebutted by other evidence showing, as matter of fact, that there was no delivery. Id. The evidence in the present case, which tended strongly to show that no consideration was paid, that Anson placed it on record himself, and that Alva had no knowledge of its execution or recording at the time, and never had possession of it, was deemed sufficient by the trial judge to overcome the presumption of delivery resulting from the recording, and we entirely agree with the conclusion so reached.

2. The proposition that Anson had no title is based upon the claim that under the will of Matthew no vested interest passed to the children during the lifetime of the mother, or that, if a vested interest did pass, it was subject to be devested by death prior to the death of the mother. This question is simply a question of intent, to be gathered from the language of the whole will. The argument for the appellant is that, because no division is to be made until the death or remarriage of the life tenant, no estate in remainder can be held to vest absolutely until the happening of one of those events. It is also said that the sixth clause indicates that there was no intention to vest an estate in any of the children prior to the mother's death, because, if the estate was vested then, upon death of any of the remaindermen intestate his share would go back to the mother, and upon her death intestate would be shared by her children by the former marriage, in violation of the wish of the testator, expressed in the sixth paragraph, that no other person should have any share of the property. Much if not all of the significance to be attached to the sixth paragraph, as bearing on this question, is removed, however, by the last clause thereof, by which it appears that the idea of the testator in adding this clause was to make sure that his children by his previous marriage should in no event share in his property, and to explain the reason of this disposition. This scheme would be in no way defeated or affected by the vesting of the estate in the remaindermen during the life of

Catherine. Our statute (sec. 2037, R. S. 1878) provides that future estates in land "are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or preceding estate. They are contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain." The primary canon in the construction of wills is that the intent is to be gathered from the whole will, rather than from the phraseology of any particular isolated clause. It is also well established that in doubtful cases the law leans in favor of an absolute, rather than a defeasible, estate, and of a vested, rather than a contingent, interest, and that, while the general rule is that a gift will be deemed contingent when it is found only in a direction to divide at a future time, this is subordinate to the primary rule that the intent, to be collected from the whole will, must prevail.

Viewing the provisions of the will before us, we are quite well convinced that the testator intended that the interests of the four children should vest at once upon his death. These children are made the sole objects of his bounty, subject to the mother's interest. The anxiety of the testator to give them each a beneficial interest, and to exclude others, is manifest. There is no provision for survivorship in the case of the death of one or more without issue, nor any provision for the disposition of the share of such a child, nor any provision cutting off the issue of a child dying before the termination of the mother's estate.

The will, in its essentials, is quite similar to the will involved in *Patton v. Ludington,* 103 Wis. 629, 79 N. W. 1073, where a similar result was reached, and where the whole subject of the vesting of remainders is so fully discussed, with references to the authorities, that it seems unnecessary to go over the ground again.

By the Court.—Judgment affirmed.

McWILLIAMS, Appellant, vs. GOUGH, Executor, and others, Respondents.

January 15—February 3, 1903.

Wills: Construction: Trusts and trustees: Title of trustees: Equitable conversion: Statute of uses and trusts: Cotenancy: Election of one beneficiary to take property in specie: Equity: Jurisdiction: Trustee's bond: Failure to give.

1. A will devised the real estate of testatrix to G., as executor and trustee, with directions to support her step-son during his life, and provided that, on his death, the land should be sold and the proceeds divided among testatrix's children who should then be living, and the heirs of those who had deceased. *Held*, that the mandatory language of the will, requiring the real estate devised to the executor and trustee to be converted by him into money and distributed in that form to the ultimate beneficiaries, by the doctrine of equitable conversion, impressed on the real estate the character of personalty, and a trust in personal property was thereby created, which was not within the statute of uses and trusts.
2. In such case, the children of testatrix, some before and some after the death of the step-son, quit-claimed their interests in such real estate to plaintiff, who brought this action against the executor and trustee to quiet title in himself. *Held*, that the title to such real estate vested in fact, as well as in form, in the executor and trustee; that there was no way by which the title thereto could pass from the executor and trustee to the beneficiaries under the will by mere operation of law, and that such beneficiaries not possessing any title, their deeds vested no title in their grantee.
3. Such deeds only gave plaintiff an equitable right to stand for his grantors in the distribution of the trust fund under the terms of the will.
4. A will devised lands to executors and trustees to hold in trust for the support of a step-son, and provided on his death that such lands be sold, and the proceeds divided among several beneficiaries. *Held*, that each beneficiary was entitled to the full benefit of a complete execution of the trust as designed by the testatrix, and the election of one beneficiary to take land instead of money, cannot, as against a non-consenting beneficiary, reconvert what is in effect a bequest of personalty into realty.

5. A will provided that certain lands should be held in trust for the support of testatrix's step-son, and, on his death, should be sold and the proceeds paid to testatrix's five children, "share and share alike," provided, in case of the death of any of such children before the step-son, that the share coming to such deceased child should be paid to his heirs in equal parts. All of testatrix's children survived her, and one of them died before the step-son leaving children. *Held*, that the executor and trustee should divide the proceeds one-fifth to each of the children of testatrix living at the step-son's death, and one-fifth, share and share alike, to the children of the child who predeceased the step-son.
6. A trust never fails for want of a trustee. Where the office becomes vacant the trust continues, its execution only being interrupted, and judicial power, under equity jurisdiction, will compel and supervise the execution of the trust where there is no statute providing for the emergency.
7. Under sec. 4025, Stats. 1898, the giving of such bond "as the court may order" is made essential to the official character of a testamentary trustee to perform the trust. Under sec. 4026, any person appointed testamentary trustee, who shall refuse to give the bond required, or neglect to do so for twenty days after receiving notice that such bond is required, shall be deemed to have declined such trust, and under sec. 4027, any testamentary trustee appointed by the court, on failure of the trustee named in the will to qualify, shall be subject to the provisions of the statute regarding trustees appointed by will, and "the estate so given in trust shall vest in such trustee in like manner, to all intents and purposes, as the same vested in the original trustee named in such will." Testatrix devised her property to G. as executor and trustee, to be held in trust for the support of a step-son, and, on his death, to sell the same and divide the proceeds among her children. The executor and trustee qualified as executor and administered the estate, and final judgment was entered therein, assigning the estate to G. as trustee, but G. never gave bond as such trustee. *Held*, that the title to testatrix's estate vested in G. as executor and trustee by force of the will, regardless of his failure to qualify as such trustee, his right to execute the trust being postponed until he filed such bond as the county court should order.

APPEAL from a judgment of the circuit court for La Fayette county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

Action to remove a cloud on title to real estate. The land

covered by the mortgage was owned and possessed by Phœbe McDevitt when she died, May 6, 1886. By her will, duly admitted to probate, she devised the land to *Peter Gough* and *Francis Gough* as executors and trustees, with directions to rent the same to the best advantage in their discretion, and apply the excess of rents received over repairs and taxes and the expense of executing the trust, to the support and maintenance of her stepson, James McDevitt, during his life, and upon his death to sell the same, perfect title thereto in the purchaser by a proper conveyance, and pay the proceeds thereof, together with any unexpended rents and profits in their hands, to her five children, share and share alike, provided that in case of the death of any of such children before that of James McDevitt, the share that would go to such deceased child, if living, should be paid to his heirs at law in equal parts. The estate was properly settled and the land in form assigned to the trustees. No order was made requiring a bond. The trustees executed the trust under the will till the commencement of this action, except that they did not sell the land and divide the proceeds as directed. Soon after Mrs. McDevitt's death her stepson, James, was placed under the guardianship of *Daniel McWilliams,* with the understanding that he should have the use of the land and, as consideration therefor, pay the taxes thereon and support his ward. That agreement was carried out till McDevitt died, September 26, 1899. All the testatrix's children survived her, and three of them survived McDevitt. Margaret Mullady, the child whose death preceded McDevitt's, gave a quitclaim deed of the land to plaintiff July 3, 1889. She left surviving her five children, all of whom are named as defendants. Another of the children, Ann Fitzsimmons, gave plaintiff a quitclaim deed of the land before McDevitt's death; and a third, Elizabeth McWilliams, gave a like deed after such occurrence. Under the three deeds plaintiff claimed to own an undivided three-fifths interest in the land when this action

was commenced. Thereafter he obtained quitclaim deeds from the testatrix's other two children. Under all of the deeds, at the time of the trial, plaintiff claimed to be the owner in fee of the whole title to the land. All the children, supposing it was their right to take the property as land if they desired, and that the title was in them as to the remainder after the expiration of the life interest, elected to exercise that right, the deeds being made accordingly.

The contention of plaintiff upon the trial was that the title to the land vested immediately upon the death of the testatrix in the executors and trustees to hold the same for the life of James McDevitt, and that the remainder, at such time, vested in the five children of the testatrix. Defendants claimed that the whole legal title vested in the trustees, with no right whatever in the children of the testatrix, except to participate in the distribution of the property when converted into money under the terms and conditions of the trust. The court took the latter view and rendered judgment accordingly. Plaintiff appealed.

For the appellant there was a brief by *Orton & Osborn,* and oral argument by *P. A. Orton.*

For the respondents there was a brief by *E. F. Conley, Spensley & McIlhon* and *P. H. Conley,* and oral argument by *Calvert Spensley.*

MARSHALL, J. In support of appellant's position, the following five propositions are submitted for consideration: (1) The trust was invalid under the laws of this state except as to the period of McDevitt's life, during which time the trustees were directed to administer the trust by applying the net rents and profits of the land to his support. (2) The children of the testatrix at her death immediately took the full fee title to the land under the will, subject to a precedent estate in the trustees for the life of McDevitt, the interest of such children being a vested future estate under sec. 2037,

Stats. 1898, and alienable under sec. 2059, Id. (3) At best the only interest of the trustees in the land after the death of McDevitt was a power in trust to sell the same and divide the proceeds thereof, the legal title being in the testatrix's children (secs. 2084, 2085, Id.), and the sale by the heirs who would have been distributees in case of the sale of the land under the power extinguished it. (4) The death of Margaret Mullady left no interest in the property, whether regarded as land or the equivalent in money, which under the terms of the will could go to her children, because the children's children were to participate as beneficiaries in the distribution by right of representation only in case of the parent being alive at the time of the death of McDevitt and entitled to take under the will, that being the proper construction of the clause to the effect that, "If any of my children shall have died before the death of said James McDevitt, then the share which said deceased child would be entitled to *if living* shall be paid," etc. (5) The *Goughs* never having qualified as trustees no title to the realty vested in them as such.

It does not seem necessary to discuss in detail the above-stated propositions. In the main they are plainly grounded on a misconception of the will. To what extent they are good law as applied to a trust in real property need not be considered. They all relate to trusts of that kind as affected by the statute of uses and trusts. Such statute deals solely with such trusts. *Dodge v. Williams,* 46 Wis. 70, 1 N. W. 92, 50 N. W. 1103; *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345; *Becker v. Chester,* 115 Wis. 90, 91 N. W. 87. All doubts as to that were long ago put at rest, as the cases cited indicate. The will here, while devising real property in form, in effect bequeathed personal property only. In mandatory language it required the land devised to the executors and trustees to be converted by them into money and distributed in that form to the ultimate beneficiaries. That, by the doctrine of equitable conversion, immediately upon the death

of the testatrix, impressed upon the land the character of personalty, and the law in respect to that class of property governs. The trust is plainly not within the statute of uses and trusts. It is a trust in personal property the same as if property of that kind in form as well as in legal effect was the subject thereof at its creation. No principle of law is better understood than that, or has been more fully discussed and applied by this court. Cases containing full discussions of the matter have been so recently decided here that we do not feel justified in treating the matter anew at this time. *Harrington v. Pier, supra; Becker v. Chester, supra.*

All questions as to the validity of the trust being out of the case because there is no law, statutory or otherwise, limiting the power of a person to create a trust in personal property, there is little left to be considered. Since the will must be considered as bequeathing personal property, if for no other reason, there can be no question but that the title to such property and the whole thereof vested in fact as well as in form in the executors and trustees. There was no way by which it could pass from them to the beneficiaries under the will or their assigns by mere operation of law, and no way by which they could convey the title or any part thereof. When the quitclaim deeds were made they did not possess any title. Therefore, obviously, their deeds did not vest title in appellant. At best such deeds only gave appellant an equitable right to stand for his grantors in the distribution of the trust fund under the terms of the will. 2 Jarman, Wills, 163.

As to the claim that the beneficiaries under the trust were entitled by election to take the property in specie, to take land instead of money, that they elected so to do, and that such election had the effect to convert what was before in legal effect personalty, if such were its character, into realty, it is a sufficient answer that the principle, though good law in a proper case, does not apply here. As counsel for respondents argue, where there are several undivided interests it is

necessary that all should join in the election to take property in a form foreign to that intended, where such intended form is required to be reached by turning land into money, in order to impress upon it the foreign character. *Holloway v. Radcliffe,* 23 Beav. 163; *Brown v. Brown,* 33 Beav. 399; *Fletcher v. Ashburner,* 1 Brown's Ch. 497; *Biggs v. Peacock,* 22 Ch. Div. 284; *Burch v. Burch,* 19 Ga. 174; *De Vaughn v. McLeory,* 82 Ga. 687, 10 S. E. 211; *Evans' App.* 63 Pa. St. 183, 186; *Baker v. Copenbarger,* 15 Ill. 103; 2 Jarman, Wills, 191–2; Adam, Eq. (7th Am. ed.) 137; Pomeroy, Eq. Jur. § 777. The text in Jarman on Wills states the law thus:

"It is not in the power of any one co-proprietor to change the character of the property in regard even to his own share, for as the act of the whole would be requisite to put an end to the trust, nothing less will suffice to impress upon the property a transmissible quality foreign to that which it had received from the testator. Thus, if lands be devised to trustees upon trust for sale and to pay the proceeds to A., B. and C., in equal shares, and after the death of the testator and before the sale is effected, A. grants a lease of his one-third, or does any other act unequivocally dealing with it as real estate, and then dies, his share will, nevertheless, it is conceived, devolve to his personal representatives, as it would still be the duty of the trustees to proceed to a sale on account of the other shares, the converting trust having been created for the benefit of all."

It is plain that to permit one of several beneficiaries under a trust in personalty to change property willed to be converted from realty to personalty and distributed as such, so as to take his share as real estate without the permission of his co-owners, would violate the fundamental principle of equitable conversion. The dominant idea in that is that property in one form, by operation of law, effectuating the intention of the creator of the trust, is impressed with the character of property of a different species, into which it may be turned, producing an equivalent in such form. That cannot be accomplished, ordinarily, without the property being dealt

with as an entirety, if the distribution form required a conversion of realty into personalty; so, while equity permits a beneficiary or several beneficiaries representing the whole interest in a converting trust, to take the property in any form they may see fit, there being nothing inconsistent therewith in the scheme of the trust, one of several beneficiaries cannot prevent the actual conversion of realty into personalty, for the interests of nonassenting beneficiaries would be thereby prejudiced. Each beneficiary is entitled to the full benefit of a complete execution of the trust as designed by the settlor.

It is said by appellant's counsel that, granting the rule above laid down, all interests at the time the judgment here was rendered were merged in plaintiff, for the intent of the will is that children of a child shall take by representation only if such child is *in esse* and entitled to take at the termination of the beneficial interest of James McDevitt. That seems to violate the plain language of the will that the converted fund shall be partitioned between the five children of the testatrix, "share and share alike. And if any of my said children shall have died before the death of the said James McDevitt, then the share which said deceased child would be entitled to, if living, shall be paid to the heirs at law of such deceased child, in equal parts to each." The last clause modifies the first. The effect of both is a direction to the trustees to pay one-fifth of the fund to each of the children of the testatrix living at James McDevitt's death, and one-fifth, share and share alike, to the heirs at law of any such children not surviving said McDevitt. That seems to be too clear to warrant resort to rules for judicial construction to determine the testamentary idea in the will.

A further point is made that the *Goughs* never became trustees, because they did not qualify as such. If that were so, it would not help appellant. The trust would continue just the same. A trust never fails for want of a trustee. Where the office becomes vacant the trust continues, its execution only

being interrupted. Judicial power, under the equity jurisdiction, will fill the office in form or effect, and compel and supervise the execution of the trust where there is no statute to provide for the emergency. *Sawtelle v. Witham,* 94 Wis. 412, 69 N. W. 72; *Harrington v. Pier,* 105 Wis. 485, 82 N. W. 345; *Bundy v. Bundy,* 38 N. Y. 410; Perry on Trusts, § 38; Story, Eq. Jur. §§ 99, 976. Respecting trusts created by wills, the county court is expressly authorized by secs. 4025, 4026, 4027, Stats. 1898, to fill the office of trustee.

But we cannot hold that mere failure to give a bond terminated entirely the official character of the *Goughs* as trustees, or that the giving of a bond was necessary thereto. They held the property as executors and trustees. They had certain duties to perform in the latter capacity, and certain other duties to perform in the former capacity, to some extent, all at the same time. Their duties as trustees were to survive their duties as executors. The statute (sec. 4025, Stats. 1898) obviously contemplates qualification of a testamentary trustee before his office as such shall commence, imposing upon him active duties. The formal assignment in this case of the property to the *Goughs* as testamentary trustees did not operate to change the title to the property. It was in them before the order, and it remained in them after that, no trustee having been appointed in their stead, notwithstanding they failed to qualify. Obviously, therefore, before a testamentary trustee has any active duties to perform, he must accept the trust in the manner contemplated by the statute, namely, by giving a bond as required by sec. 4025, Id. The language thereof is mandatory to that effect. The only element as to the bond left to the discretion of the court is the amount thereof, the number and character of the sureties. "Every trustee," etc., shall give a bond," etc., "in such sum and with such sureties as the court may order, conditioned," etc., is the language of the statute. Evidently, the words, "as the court may order," do not modify the mandatory require-

ment of a bond. That is made essential to the official character of the trustees to perform the trust. Sec. 4026 is to the effect that any person appointed trustee by any will, "who shall refuse to give the bond herein required, or neglect to do so for twenty days after receiving notice that such bond is required, shall be deemed to have declined such trust." The legislative idea there voiced is that a trustee shall have twenty days after notice that a bond is required of him as a condition precedent to his right to execute the trust, and that if he fails to perform such condition such right shall be terminated, leaving the court to fill the place by appointment. The next section provides for that. But the lapse of the right of such trustee to execute the trust where the property is willed directly to him does not devest him of the title. That is not suspended for an instant. It passes under the will according to the terms thereof to the trustee, but without authority to execute the trust except upon compliance with the conditions of the statute. That is clearly intended by sec. 4027, Id., which provides that the new trustee appointed by the court shall be subject to the provisions of the statute regarding the trustee appointed by will, and that "the estate so given in trust shall vest in such trustee in like manner, to all intents and purposes, as the same vested in the original trustee named in such will." Obviously, the estate is not given to a trustee appointed under such section merely by his receiving the appointment. It is given thereby and by the qualification of the trustee. Then, and not till then, the estate vests in him to the same extent as it vested in the testamentary trustee. Title vests in the latter under the will, where the devise or bequest is to him as trustee, and the will does not contemplate an interval between the death of the testator and the vesting of the title in such trustee,—not under the probate of the will or any mere order of the court, or under the statute requiring qualification of the trustee. It follows that the title to the property in question vested in the *Goughs* as

executors and trustees, it having been directly willed to them, regardless of their failure to qualify as trustees; and, so far as appears in this case, the title is still in them. The situation has not changed. The trust to sell the property and distribute the proceeds is still to be executed.

What has been said disposes of all the questions raised on this appeal and requires affirmance of the judgment.

By the Court.—So ordered.

OATES, Respondent, vs. ERSKINE'S ESTATE, Appellant.

January 16—February 3, 1903.

Estates of decedents: Claims: Express contract: Evidence: Instructions to jury.

1. An action against the estate of a decedent for board was based on an express contract. The claimant and decedent were not relatives. The court instructed the jury, that "it is not absolutely necessary to the establishment of an express contract that the witnesses should be produced who were present when the contract was made. It may be inferred from circumstances established to the satisfaction of the jury as true by the evidence, if from such facts and circumstances the jury are convinced that the express contract claimed was in fact made." *Held*, that no error was thereby committed, as the rule that an express contract for board or service can only be established by direct and positive evidence, or by circumstantial evidence equivalent to direct and positive evidence, only applies where the parties are near relatives. *Tyler v. Burrington*, 39 Wis. 376, and *Wells v. Perkins*, 43 Wis. 160, distinguished.
2. In an action on an express contract the defendant is not prejudiced by correct instructions as to implied contracts, the jury having been expressly charged that there can be no recovery on an implied contract. Such instructions amount to a warning to the jury, fairly tending to warn them against the error of bringing in a verdict based on an implied agreement, in case an express contract was not shown to their satisfaction.

APPEAL from a judgment of the circuit court for Iowa county: GEO. CLEMENTSON, Circuit Judge. *Affirmed.*

This is a claim against an estate to recover the reasonable value of several years' board furnished to the intestate in her lifetime. It appeared that the deceased, who was an unmarried woman, began boarding with the plaintiff at Chicago February 1, 1887, and continued to board there until November 15, 1893; that such board was reasonably worth the sum of $4 per week, and that no part of it was ever paid for; also that there was no relationship of any kind between the parties. The plaintiff claimed that at the time the deceased commenced to board with her it was agreed that the board should be paid for when William Walker, an uncle of the deceased (seventy years of age), should die, and the deceased come into possession of his estate, as she expected to do. The answer denied the making of this contract, and pleaded the statute of limitations. The evidence showed that William Walker died May 25, 1899, leaving his property to said Sarah Erskine, who died February 3, 1900, while the estate of William Walker was being administered. The principal contest upon the trial was upon the question whether the express contract above mentioned was ever made. The only direct evidence upon the subject was the testimony of the plaintiff's father, who testified, in substance, that when the deceased came to board with the plaintiff it was understood that she expected to receive a large portion of the estate of her uncle, William Walker, and that she then said that when she came into possession of that property she would make the board all right. There was also testimony by other witnesses of conversations held with the deceased at various times, in which she stated that she intended to pay the plaintiff, or that she proposed to give her $1,000, or that some day she would be able to pay the plaintiff, and words of similar import. On the part of the defendant there was testimony showing that the deceased received $5,000 in property and money from the estate of an uncle in 1888 and 1889. The death of William Walker, leaving an estate of $10,000 to the

deceased, in May, 1899, was admitted, and it was shown that the deceased took immediate possession of said estate, and made some loans therefrom; also that she made two or three small loans to the plaintiff's father and brother while she was living with the plaintiff. The court, upon defendants' motion, instructed the jury to the effect that the burden of proof to establish the contract claimed was on the plaintiff, and that payment might be inferred from facts proven to their satisfaction, and that it is not necessary that payment be proven by receipt or instrument in writing. In connection with this instruction the court further charged the jury that:

"It is not absolutely necessary to the establishment of an express contract that witnesses should be produced who were present when the contract was made. It may be inferred from facts and circumstances established to the satisfaction of the jury as true by the evidence, if, from such facts and circumstances, the jury are convinced that the express contract claimed by the plaintiff to have been made was in fact made."

The court further, after stating plaintiff's claim, charged the jury of its own motion as follows:

"(2) One who goes to board with another, whether anything is said about the price of board or not, is, by the law, implied to agree to pay what his board is reasonably worth.

"(3) So, when Miss Erskine went to board with the plaintiff, the law would imply that she was bound to pay for her board what it was reasonably worth, from time to time, and the whole of what was due for board would be due and payable at once after she quit boarding with the plaintiff. What I have just stated you will understand to refer only to the supposed case that there was no agreement made between the plaintiff and Miss Erskine regarding her boarding and the time when the amount owing for her board was to be paid.

"(4) The plaintiff can recover nothing in this action upon an implied contract, for the reason that, as I have stated, upon such a contract all the indebtedness for board would be due and collectible on November 16, 1893, the day after she

left finally as a boarder the home of the plaintiff, and the six-years statute of limitations would begin to run against the plaintiff's claim upon that day, and on November 16, 1899, the claim would be barred, and be noncollectible against Miss Erskine; and her estate, after her death, would not be liable for it.

"(5) What I have said in reference to the law of implied contract, I have thought it best to say for your information, although the plaintiff does not seek to recover in this action upon an implied contract.

"(6) The plaintiff bases her claim upon an express contract.

"(7) The contention of the plaintiff is that, when Miss Erskine began to board at her home, or about that time, she made known the fact that she was, or expected to be, the heir or the devisee of her uncle, William Walker, when he died, and that it was then understood and agreed between the plaintiff and her that she would board at the plaintiff's home, and pay the plaintiff what was coming to her for such board, when her uncle died, and she came into his property.

"(8) If you are convinced by the preponderance of the evidence, taking into careful consideration all the facts and circumstances established by it, that the contention of the plaintiff as set forth in the last paragraph is true, and if you are also convinced that the board aforesaid has not been paid for, your verdict should be in favor of the plaintiff for such a sum as you are convinced by the evidence was the reasonable amount due to the plaintiff under express contract for the board of Miss Erskine on the 16th day of October, 1900, the date of the filing the plaintiff's claim in the county court, with interest thereon from the date last mentioned to to-day at six per cent.

"(9) If you are not convinced that there was such an express contract between the plaintiff and Miss Erskine as is set forth in the foregoing paragraph No. 7, your verdict will be for the defendant.

"(10) Also, if you find that all that was due the plaintiff for board was paid by Miss Erskine in her lifetime, your verdict will be for the defendant. I have instructed you already that the burden of proof is upon the plaintiff to convince you that the agreement for the payment for the board as

set forth in the seventh paragraph of my instructions was made, but I omitted to instruct you, as the law requires, and as I now do, that the burden is upon the defendant to convince you that the board was paid for. In other words, one who claims that a debt he owes has been paid must prove it."

The jury returned a verdict for the plaintiff for $1,479.33. A motion to set aside the verdict and for a new trial was made and overruled, and from judgment upon the verdict the defendant appeals.

For the appellant there was a brief by *J. M. Smith* and *Spensley & McIlhon,* and oral argument by *Calvert Spensley.*

For the respondent there was a brief by *Fiedler & Fiedler,* and oral argument by *E. C. Fiedler.*

WINSLOW, J. The defendant's most important contention is that the court made fatal errors in instructing the jury as to the proof necessary to establish the making of the express contract alleged. What the court said upon this point was as follows:

"It is not absolutely necessary to the establishment of an express contract that witnesses should be produced who were present when the contract was made. It may be inferred from facts and circumstances established to the satisfaction of the jury as true by the evidence, if from such facts and circumstances the jury are convinced that the express contract claimed by the plaintiff to have been made was in fact made."

The defendant claims that the same rule of evidence applies in this case as would apply had the parties been near relatives, namely, that such an express contract "can only be established by direct or positive evidence, or by circumstantial evidence equivalent to direct and positive." *Tyler v. Burrington,* 39 Wis. 376; *Wells v. Perkins,* 43 Wis. 160. The idea is plainly erroneous. The very stringent rule above cited is a special and exceptional rule, which has been laid down by the courts in cases of services rendered or board furnished by one near relative to another, because in such

cases no contract to pay for them can be implied; but, on the other hand, there is a positive presumption that the services or board were intended to be gratuitous. To meet this presumption, and guard against the possibility of the implication of a contract by the jury in such cases, it was deemed that the exceptional rule above stated should be applied. In the absence of such relationship, however, as in the present case, there is no presumption to be overcome, and an express contract may be shown by proof of independent facts and circumstances which convince the jury that the contract was in fact made, just as any other fact in issue may be proven by such evidence. This was, in substance, what the court charged the jury in the present case, and there was, therefore, no error.

The defendant also claims that the trial court erred in giving any charge to the jury on the subject of implied contract, for the reason that there could be no recovery in the case on an implied contract to pay because it would be barred by the statute of limitations; hence the question was not in the case and instructions thereon were liable to confuse the jury. The law, as stated by the court, was certainly correctly stated; and, while there was no recovery sought on implied contract, we think the instructions were entirely proper for the information of the jury in order that they might more fully appreciate the situation of the parties. The court expressly told the jury that there could be no recovery on such a contract, and that the express contract alleged must be proven, in order to entitle the plaintiff to recover. That part of the charge pertaining to this subject, when taken together, amounts rather to a warning to the jury, fairly tending to guard them against the very natural error of thinking that they might find a verdict based on an implied agreement in case the express contract was not shown.

The remaining contentions made by the appellant are all embraced in the claim that the evidence submitted was in-

sufficient to prove the express contract alleged. We shall not review the evidence. It must be enough to say that, in our judgment, it was sufficient.

By the Court.—Judgment affirmed.

SCHMECKPEPPER, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

January 16—February 3, 1903.

Railroads: Waters: Bridges: Obstructions: Damages: Appeal and error: Instructions to jury: Harmless error.

1. Where, in an action against a railroad company for damages to lands caused by the overflow of a stream obstructed by a bridge erected and maintained by defendant, there was no material issue presented by the testimony except as to the amount of damages, errors in instructions to the jury in submitting other questions are immaterial.
2. In an action for damage to land from overflow caused by an embankment built by defendant with inadequate provision for carrying off the water of a stream, it is not necessary to a recovery that the particular damage caused should have been within the anticipation of a reasonably prudent person.
3. In an action for damages to land due to an embankment built by defendant, with inadequate provision for carrying off the water of a stream, causing an overflow of water during a specified storm, the evidence of damage was confined to that of experts, who testified to examinations of the land just before and just after that storm. *Held*, that it was immaterial whether other storms, preceding and subsequent to the storm specified, did or did not cause damage.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action to recover damages by way of destruction of crops and permanent injury to soil from the casting of quantities of sand thereon, suffered by plaintiff, the owner of low lands adjoining Bostwick creek, by reason of the inadequacy of a

certain pile bridge constructed by the defendant across said creek; the inadequacy being alleged to be due both to original construction and subsequent obstruction of the spaces between the piles, so that it was insufficient to carry the waters of said creek under circumstances which might reasonably be expected. The damage was predicated upon a single storm occurring July 14, 1900. The evidence of permanent damage consisted of a comparison of the land shortly before that storm and immediately afterward. A special verdict was taken of eleven questions, to the following effect: (1) The bridge was of sufficient capacity to allow the passage of such waters as ought reasonably to have been expected to flow through it. (2) The bridge was not of sufficient capacity to allow the passage of "such waters, and any and all driftwood and other materials brought down by such waters, as ought reasonably to have been expected to flow through it." (3) The driftwood which floated down accumulated in and against said bridge, and caused the waters to flow over the plaintiff's land. (4) Damage was thereby done. (5) Such damage was the natural and probable result of the want of such sufficient capacity in the bridge. (6) The freshet of July 14, 1900, was not unusual nor extraordinary. (7) The storm of July 11, 1899, did not cause water to overflow the plaintiff's land and carry sand upon it, so as to permanently injure it. (8) Neither did the storm of October 27, 1900. (9) (Immaterial.) (10) Damage to crops, $209.65. (11) Permanent damage to plaintiff's land from the overflow of July 14, 1900, $700. Defendant moved to strike out the answers to the 5th, 7th, 8th, 9th, 10th, and 11th questions, and for judgment upon the corrected verdict and undisputed evidence, and, in the event of the denial of that motion, for new trial. Such motions were overruled, and judgment entered for the plaintiff for the amount of damages found in response to the 10th and 11th questions, from which judgment defendant appeals.

Edward M. Hyzer, for the appellant.

For the respondent there was a brief by *McConnell & Schweizer,* and oral argument by *J. F. McConnell.*

DODGE, J. After a careful examination of the evidence in this case, we are led to the conclusion that notwithstanding the special verdict of eleven questions and the numerous exceptions there was no material issue in the case, except the question of damages, as to which there was any conflict of evidence. That the bridge was inadequate to carry off the waters which might reasonably be expected to flow to it,—meaning, of course, the waters with their customary and expected accompaniment of silt and driftwood; that thereby, on July 14th, the plaintiff's lands were flooded so as to do damage as the natural and probable result thereof; that the freshet on that date was neither unusual nor extraordinary,—all these appear without dispute from the testimony of witnesses, offered both by plaintiff and defendant, and the court would have been justified either in answering said questions in favor of the plaintiff, or in directing a verdict in his favor, submitting only the question of damages.

From this view it of course results that errors of instruction in submitting any such questions are immaterial. Thus the industry of the trial court in describing to the jury the defendant's legal duty with reference to maintenance of bridges across watercourses, while wholly unnecessary to enable an answer to the simple question of fact submitted to them by the second question, cannot have prejudiced the defendant; for the negative answer to that question which the jury did give should have been ordered by the trial court.

An assignment of error predicated upon the failure of the court to inquire whether the quantity of driftwood carried against the bridge on July 14th was unusual and extraordinary is disposed of by the same consideration. The testimony may be searched in vain for anything to support an

affirmative answer to such a question, while defendant's roadmaster, who was present with his men endeavoring to keep the bridge from blocking up, testified expressly that it was such as usually came down in high water.

Another assignment of error, for that it was not left to the jury to find whether damage ought to have been anticipated by a person of ordinary intelligence and prudence, is equally without foundation. If such element be at all necessary to establish the liability of one who obstructs a watercourse for the damage resulting from overflow in the absence of extraordinary freshet, it certainly is matter of common knowledge that the setting back of water onto the low lying farm lands above an obstruction is likely to cause damage. It is not necessary to recovery that the particular damage caused should be within the anticipation of a reasonably intelligent and prudent person. *Mauch v. Hartford,* 112 Wis. 40, 60, 87 N. W. 816; *Meyer v. M. E. R. & L. Co., ante,* p. 336, 93 N. W. 6.

Upon the only remaining assignment of error, which is substantially to the effect that the court erred in not refusing to allow the jury to find any permanent damages, counsel for appellant devotes considerable space to the discussion of the probable effect of two other storms, which as he claims, were extraordinary and unusual, one occurring in June, 1899, and the other in October, 1900; apparently insisting that the separation of the damage done by the storm of July 14, 1900, from that caused by the other storms was pure conjecture. An examination of the evidence renders this position so obviously untenable that we are somewhat at a loss to understand appellant's insistence thereon. Doubtless if the plaintiff had sought to predicate permanent damages to the land upon a comparison between the conditions existing before any of these storms and those existing after all of them there would have been force to the argument that the jury could not say what part of the damage was due to one storm

and what to another; but the plaintiff presented no such case. His proof as to damages was mainly that of experts thoroughly familiar with the lands, who testified to an examination of them shortly before July 14, 1900, and who compared its then condition, after any change that might have been worked by the storm of the previous year, with its condition shortly after July 14, 1900, and before the storm of October of that year. This testimony left no room for damage caused by either of the other storms to enter into the damages testified to. The plaintiff declined to go into proof as to the effect of either of the other storms, except for the testimony of two or three witnesses in contradiction of a certain phase of the effect of that of October, 1900, and there was no issue in the evidence with reference to either of those storms. It was wholly immaterial whether they did or did not cause damage. If they did, that damage was excluded in the manner of offering the proofs. The only improper element in the trial with reference thereto was in submitting to the jury questions as to whether such other storms caused any damage and not in refusing to allow such ulterior immaterial considerations to defeat the effect of the answer of the jury to the only material question, namely, the amount of damage caused by the storm specified in the complaint. As to that question there was a fair conflict of expert evidence, the opinions varying from two or three hundred dollars on the one side to twelve or sixteen hundred dollars on the other, and the seven hundred dollars adopted by the jury was certainly within the limits of credible evidence.

No error prejudicial to appellant is presented by the record.

By the Court.—Judgment affirmed.

JOHN A. TOLMAN COMPANY, Respondent, vs. BUTT and another, imp., Appellants.

January 17—February 3, 1903

Guaranty: Continuing contract: Prior indebtedness of principal: Effect of failure to disclose: Evidence.

1. A contract between a salesman and his employer, guaranteed by defendants, was for "one year from date" and might "continue from year to year." The guaranty expressly covered "all moneys and goods," which the employer might "from time to time advance" to the salesman, and "any and all indebtedness" which might thereafter "become due to" the employer "from him, whether by the terms of any contract or not, in excess of the amount due" the salesman. The guaranty further provided "that any extension" might be granted the salesman "at any time" without notice or affecting the guarantor's liability, and that "for such amount" the guaranty was therein declared to be "intended as a continuing guaranty until revoked by notice in writing." *Held*, that the guaranty covered and was binding for the three years through which the salesman's employment was extended.
2. Where an employer's contract with a traveling salesman required him to give bond for all sums in which he might become indebted to the employer, and such guaranty was given, in an action brought thereon, in the absence of evidence that the guarantors were induced to sign by fraud, misrepresentation, or deceit, evidence, that at the time of the execution of the guaranty, and unknown to the guarantors, the salesman was already largely indebted to the employer, is irrelevant.
3. In such case, an agreement in the written guaranty, that the guarantors would "accept a verified written statement of the account (of the salesman) as kept on the regular books" of the employer, is binding and conclusive on the guarantors.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This is an action to recover $1,187.80, with interest from September 21, 1900, for moneys belonging to the plaintiff, received by the defendant R. A. Russell between May 1, 1897, and March 15, 1900, while acting as traveling sales-

man for the plaintiff, in excess of what he paid and accounted to the plaintiff during that period. The action is based upon a written contract bearing date May 1, 1897, between the plaintiff and R. A. Russell, and a written guaranty of the same, executed by Russell and the appellants. By such contract Russell was to faithfully and diligently perform such duty as such salesman for one year from date, and might continue from year to year, with the right in the plaintiff to terminate the contract at any time; Russell to receive for compensation certain percentages on the profits of goods sold; he to pay his own expenses, including sample cases; but the plaintiff was at liberty to advance to him moneys for the purpose of defraying expenses, which Russell was to repay on demand, and "to furnish a good acceptable bond for the payment of any money due" to the plaintiff "in excess of the amount due" to Russell, "with all costs, attorney's fees, and expenses and seven per cent. interest until paid;" the plaintiff to be the final judge of all credit given customers, and no order to be counted as a sale until accepted by the plaintiff. The written guaranty executed under the hands and seals of Russell and the appellants, upon which the action is in part based, recites the making of such contract between Russell and the plaintiff, and that "in consideration of the sum of one dollar and other valuable consideration received from" the plaintiff, the receipt of which is thereby acknowledged, Russell and the two appellants did guaranty to the plaintiff as follows:

"*I hereby guarantee* the payment to *John A. Tolman Company* of *any and all moneys collected* by Ralph A. Russell for account of *John A. Tolman Company, and for all moneys and goods which they may from time to time advance* to said Ralph Russell, *and any and all indebtedness* . . . which may *hereafter become due* to *John A. Tolman Company from him, whether by the terms of any contract or not,* in excess of the amount due said Ralph A. Russell from said *John A. Tolman Company.* And I hereby *waive notice of acceptance*

of this guaranty by *John A. Tolman Company,* and agree to accept a verified written statement of the account of Ralph A. Russell, as kept in the regular books of said *John A. Tolman Company,* as correct as between the said company and the said Ralph A. Russell, and as competent and conclusive evidence as to the extent of my liability, and *without requiring any demand or notice of default;* and *I agree that any extension may be granted him, or any security taken, or security taken surrendered, and any surety hereto released at any time without notice, or affecting my liability.* My liability, however, is limited hereby to two thousand dollars ($2,000.00), and all costs, attorney's fees, and expenses, together with interest at 7 per cent. per annum until paid, *and for such amounts this is intended as a continuing guarantee until revoked by notice in writing to me.* Any amount which shall become due from me upon this contract of guarantee I agree to pay at the office of *John A. Tolman Company,* in Chicago, Ill., without relief from valuation or appraisement laws."

The defendant Russell made no answer to the complaint. The appellants answered by way of admissions, denials, and counter allegations to the effect that for some years prior to giving the bond Russell had been employed by the plaintiff in the same capacity, and during that time he embezzled $1,600; that the plaintiff, knowing the fact, exacted the bond or agreement of guaranty to cheat and wrong the appellants, who were at the time ignorant of such embezzlement; and by way of counterclaim the answer alleged that, after Russell quit the services of the plaintiff, many collections were made of goods sold by him, on which he was entitled to commissions, according to such contract, to the amount of $250, which they claimed should be deducted from the amount claimed by the plaintiff. The appellants were allowed to amend such answer, but not to materially change the nature of the defense, except to allege, in effect, that Russell was so employed by the plaintiff under the contract from May 1, 1897, to July 26, 1897, when the bond or guaranty was exe-

cuted, and that the same was so given without any consideration therefor. The plaintiff, by way of reply, denied each and every allegation of the counterclaim, and alleged that Russell had, in the complaint, received all the credits from the plaintiff to which he was entitled. At the close of the testimony the court directed a verdict in favor of the plaintiff for $1,249.80, being the amount demanded in the complaint, with interest to that date. From the judgment entered thereon accordingly, the defendants *Butt* and *Eckhart* bring this appeal.

For the appellants there was a brief by *C. W. Graves* and *C. M. Butt, Jr.*, and oral argument by *Mr. Graves.*

For the respondent there was a brief by *Smith & Griffin* and *Silbaugh & Bennett,* and oral argument by *C. J. Smith.*

CASSODAY, C. J. The liability of the appellants is based upon the bond or written guaranty, which speaks for itself.

1. Error is assigned because the court held, as a matter of law, that the appellants were liable thereon after the termination of the first year. The contract so guarantied was "for one year from date," and might "continue from year to year." The guaranty expressly covered "all moneys and goods" which the plaintiff might "from time to time advance" to Russell, and "any and all indebtedness" which might thereafter "become due to" the plaintiff "from him, whether by the terms of any contract or not, in excess of the amount due" Russell, and each of the appellants and Russell therein agreed "that any extension" might "be granted" to Russell "at any time, without notice or affecting" his "liability," up to the amount therein stipulated; and that "for such amounts" the guaranty was therein declared to be "intended as a continuing guaranty until revoked by notice in writing." The plaintiff's contract with Russell was extended, and did continue from year to year until March 15, 1900, when Russell quit the services of the plaintiff, without its consent.

Such being the express terms of the contract and guaranty, we are unable to perceive any ground for holding that the guaranty did not cover the entire time during which Russell was so employed under the contract. Counsel for the appellants cite a half dozen adjudications in which the plaintiff in this case was a party, and say:

"The date of the above decision is given for the purpose of showing that the plaintiff is continually changing the language of its contracts and bonds for the purposes of circumventing and avoiding the construction placed upon them by the courts in the above cases."

The question here is whether this contract will bear the construction which the trial court put upon it. It is enough to say that the guaranty in question contains provisions and agreements upon the part of the appellants not found in any of the agreements of the guarantors in any of those cases. Especially is this so as to the clause, "whether by the terms of any contract or not." And yet two of those cases are against the contention of the appellants. *John A. Tollman Co. v. Bowerman,* 5 S. D. 197, 58 N. W. 568; *John A. Tolman Co. v. Griffin,* 111 Mich. 301, 69 N. W. 649; *John A. Tolman Co. v. Reed,* 115 Mich. 71, 72 N. W. 1104. See, also, *John A. Tolman Co. v. Rice,* 164 Ill. 255, 45 N. E. 496. We must hold that the guaranty covered the liability from May 1, 1897, to March 15, 1900.

2. Error is assigned because the court refused to permit the appellants to show that Russell was largely indebted to the plaintiff when the guaranty was executed, and that the appellants were ignorant of that fact. There is no evidence tending to prove that the appellants were induced to sign the guaranty by reason of any fraud, misrepresentation, or deceit on the part of the plaintiff. The very fact that the plaintiff exacted such guaranty shows that it was unwilling to trust to the responsibility of Russell alone. Such proposed evidence was clearly irrelevant, and was properly excluded.

3. Error is assigned because the court refused to strike out the deposition of Samuel A. Tolman, or to permit proof that it had been materially altered. It does not appear that it was altered after it was signed by the witness. Besides, it was stipulated in the case, before such ruling, that the exhibit mentioned in that deposition should be received and read in evidence as being a correct statement of the account of the plaintiff with Russell from July 29, 1897, to February 17, 1900, inclusive, to the same extent as the account books of the plaintiff might be received when proven according to law. Each of the appellants agreed in the guaranty "to accept a verified written statement of the account of Ralph A. Russell, as kept in the regular books of" the plaintiff, "as correct as between the" plaintiff and Russell, "and as competent and *conclusive evidence* as to the extent of my [his] liability." The cases cited by appellants are to the effect that such agreement was binding and conclusive upon them. *John A. Tolman Co. v. Clements,* 98 Mich. 6, 56 N. W. 1038; *John A. Tollman Co. v. Bowerman,* 5 S. D. 197, 58 N. W. 568; *John A. Tolman Co. v. Griffin,* 111 Mich. 301, 69 N. W. 649. There is no dispute as to the amount due the plaintiff from Russell. The verdict was properly directed in favor of the plaintiff.

By the Court.—The judgment of the circuit court is affirmed.

HILL, Respondent, vs. SIDIE, Appellant.

January 17—February 3, 1903.

Vendor and purchaser of land: Relation after default: Landlord and Tenant: Contracts: Tenant at sufferance.

A provision in a contract for the sale of lands that, on the vendee's default, he should hold the premises from the date of the contract as tenant at sufferance of the vendor, subject to

be removed as a tenant holding over by process, under the statute in such case made and provided, is ineffective to change the relationship between the vendee in possession and the vendor to that of landlord and tenant, or deprive such vendee of his rights and equities under his contract of purchase. *Wright v. Roberts*, 22 Wis. 161, distinguished; *Diggle v. Boulden*, 48 Wis. 477, followed.

APPEAL from an order of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Reversed.*

This is an action to recover the reasonable value of the use and occupation of certain farm lands. The complaint alleges the making of a contract in writing by the parties July 1, 1893, by which the plaintiff agreed to sell, and the defendant to purchase, the lands in question, for the sum of $500, to be paid in five equal annual instalments, beginning January 1, 1896. The contract also provided that the defendant should mortgage the crop each year to the plaintiff as security for payment of the interest, and the first payment of principal until such first payment of principal was made. The contract further provided that defendant should pay the taxes levied on the lands, keep the improvements and fences in repair, and "hold the said premises from the date hereof as tenant of sufferance of the party of the first part, subject to be removed as a tenant holding over by process, under the statute in such case made and provided, whenever default shall be made in the payment of any of the instalments of purchase money above specified." The complaint further alleged that at the time of the execution of the contract the defendant was in possession of the land as plaintiff's tenant, and had planted thereon the crop for the year; that defendant continued to occupy the land until the fall of the year 1900, but refused to make any payments of principal or interest on the contract after January 1, 1895, whereupon he became the tenant of sufferance of the plaintiff under the terms of the contract; and that the use and occupation of the land was worth $50 a year for the entire time, no part of

which sum has been paid, nor has any part of the amount due on the contract been paid since the payment of the interest due January 1, 1895. Judgment for $350 and costs is demanded. A general demurrer to this complaint was overruled, and the defendant appeals.

For the appellant there was a brief by *Doherty & Baldwin,* and oral argument by *J. F. Doherty.*

H. P. Proctor, for the respondent.

WINSLOW, J. The sole question in this case is as to the legal effect of that clause in the land contract which provides that in case of default in payments the vendee shall hold the premises as "tenant of sufferance" of the vendor. The plaintiff claims that this clause operates to change the relation of the parties, so far as possession of the land is concerned, into that of landlord and tenant, and relies upon *Wright v. Roberts,* 22 Wis. 161. The defendant, on the other hand, claims that the principle stated in *Wright v. Roberts* has been completely overruled by the later case of *Diggle v. Boulden,* 48 Wis. 477, 4 N. W. 678. There is certainly a direct conflict in principle between the two cases. *Wright v. Roberts* was a case where the exact point in the case at bar was presented, and it was held, under a precisely similar contract, that upon default an action for use and occupation could be maintained, because by the clause in question the parties had created the relation of landlord and tenant, with all the remedies which were incident to that relation. On the other hand, it is held in *Diggle v. Boulden,* where, under a similar contract, the vendor upon default brought an action in equity to foreclose the contract, that the objection that the vendor had an adequate remedy at law, by proceeding against the vendee as a tenant at sufferance, could not be maintained, because the vendee "had rights and equities under his contract of purchase which would defeat an action at law against him as a mere tenant at sufferance; and such an action would not lie

in such a case where the appellant is in possession as purchaser, having paid part of the purchase money." In both of the cases cited, as in the case at bar, the vendee was in possession under the contract of sale. The first case goes upon the principle that the clause in question is effective to change the relationship of the parties, so far as possession of the real estate is concerned, to the relationship of landlord and tenant, and the other upon the principle that it does not change such relationship so long as the vendee has any equity under his contract. There is no way of reconciling the two cases, and the difficulty is increased, rather than diminished, by the fact that the former case is not referred to in the later case, although it was cited in the briefs and relied upon as authority. Another fact is of some significance, namely, the fact that *Wright v. Roberts* has not been affirmed or even cited in any subsequent opinion in this court. It certainly is important that the rule in such cases be definitely and certainly settled. It is not so important how it be settled, as it is that there should be no doubt about it. It is in the full sense a rule of property, and should not be subject to changes. Viewed in this light, it seems that the rule as laid down in *Diggle v. Boulden* should be followed. It has stood upon the books for nearly twenty-three years as the last authoritative utterance of this court upon the question. It must be presumed that it has been regarded as stating the position of this court, and also that contracts which have been made since that time have been made with reference to it. It has support in the general and familiar doctrine that the law does not favor forfeitures of valuable rights, and will endeavor to avoid them. It finds support, also, in the following cases: *Chicago, B. & Q. R. Co. v. Skupa,* 16 Neb. 341, 20 N. W. 393; *Ellsworth v. McDowell,* 44 Neb. 707, 62 N. W. 1082.

By the Court.—Order reversed and action remanded, with directions to sustain the demurrer.

THE STATE EX REL. HALLAUER, Appellant, vs. GOSNELL, City Clerk, Respondent.

January 17—February 3, 1903.

Municipal corporations: Statutes: Construction: Common council: Board of public works: Powers: Fixing water rates: Use of meters: Certiorari: *Jurisdiction: Abuse of discretion.*

1. By ch. 162, Laws of 1887, amending the charter of the city of La Crosse, there was established a new department of the city government, known as the "board of public works." Such board was thereby given power, subject to approval by the common council, to make by-laws, rules and regulations in relation to the waterworks of the city, and therein to fix uniform water rates to be paid for use of water furnished by such waterworks. Such powers had theretofore been conferred by the charter on the common council, but by the amendment the authority of the common council "to establish water rates to be paid by persons using the water" was eliminated. The amendment further provided that the common council should have power "by ordinance to make and enforce all needful regulations for ascertaining the amounts to be paid as water rates by persons using the water." *Held*, that the dropping from the enumerated powers of the common council the unlimited power to fix water rates, and transferring unlimited authority in the matter to the board of public works, its action not to have the force of law until approved by the common council, made that method of dealing with that subject exclusive, and the common council was empowered to fix water rates only by acting upon the recommendation of the board of public works.
2. Where a city charter authorizes the common council, by ordinance, to make and enforce all needful regulations for ascertaining the amounts to be paid as water rates by persons using the water, and necessary and expedient to protect such waterworks and the use thereof, and the whole scheme of the charter provision is, that the consumer shall bear all the expense necessary to enable him to take water from the public supply in the water mains, a requirement contained in an ordinance, adopted by the common council, that the consumers, in certain cases, at their own expense provide and use meters, and keep them in repair, is legitimate.
3. In such case, the provisions of the ordinance requiring consumers using service pipes above a certain diameter to furnish

meters, and leaving it optional with consumers using service pipes below that diameter, is not, as a matter of law, an unreasonable classification.

4. A suitor has no absolute right to the common-law writ of *certiorari*. Where the relator shows no equity, and, so far as his legal rights are concerned, has suffered no injury not remediable at law, it is proper to deny the use of the writ; and, where it further appears that the relator, as a private individual with a trifling injury, remediable by ordinary means, complains against the acts of a municipal corporation, it is an abuse of discretion to permit the use of the remedy of *certiorari*.

5. A city council, having authority by ordinance to fix water rates only by acting upon the recommendation of the board of public works of the city, established such rates without previous recommendation of the board of public works. It did not appear that the rates fixed by the council were inequitable. The pecuniary injury to the consumer was trifling, as compared with the disturbance of public affairs in compelling the city to defend its jurisdiction before the courts upon a common-law writ of *certiorari*. *Held*, that it was an abuse of judicial discretion to allow the writ on the relation of a consumer.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

The city of La Crosse owns and operates a system of waterworks for the purpose of supplying water within the municipality for public and private use. Its charter, prior to 1887, vested power in the common council, by subd. 11, sec. 3, subch. IV, ch. 135, Laws of 1876, as amended by sec. 6, ch. 183, Laws of 1881:

"To provide for the erection of waterworks for the supply of water to the inhabitants of the city; to lay down water pipes; to establish water rates to be paid by persons using the water therefrom, and to prevent unnecessary waste of the water by any person or persons; to pass from time to time such ordinances as may be deemed necessary or expedient for the construction, regulation or protection of such waterworks and pipes and to enforce the same by suitable penalties."

That was amended in 1887 by ch. 162 of the laws of that year, the words "to establish water rates to be paid by persons

using the water therefrom" being eliminated. The charter was at the same time and by the same law further amended by establishing a new department of city government of an executive character, to be known as the "Board of Public Works," and to consist of members elected by the people. At the same time and by the same law the charter was further amended, adding thereto a new subchapter, numbered IX, on the subject of waterworks, in which the maintenance and everything in relation to the operation of the waterworks, so as to effect the purposes thereof, was placed under the immediate charge of the board of public works, but subject to the direction of the common council. By sec. 1 of that subchapter it was provided as follows:

"The board of public works, subject to the direction of the common council, shall assume and have exclusive charge and superintendence of the waterworks of said city, and of all property, records, contracts, transactions, reports, accounts, surveys, maps, plats, estimates, profiles, plans and documents of whatsoever nature pertaining thereto, and it shall thereafter be the duty of such board of public works to examine and consider all matters relative to supplying the city of La Crosse with a sufficient quantity of pure and wholesome water for the use of its inhabitants."

By sec. 7 the waterworks, and all the grounds, buildings, fixtures, machinery and other things appertaining thereto were declared to be under the control of the said board, with power to regulate and control and have general supervision of the same subject to the authority of said common council. By sec. 8 the board was given power to establish water rates, the following language being used:

"The said board shall have power from time to time to make and enforce by-laws, rules and regulations in relation to the said waterworks, and before the actual introduction of water they shall make by-laws, rules and regulations fixing uniform water rates to be paid for use of water furnished by the said waterworks, and fixing the manner of distributing and supplying the water for use or consumption, and for

withholding or shutting off the same for cause, and they shall have power, from time to time, to alter, modify or repeal such by-laws, rules and regulations now in force: provided, however, that no such by-law, rule or regulation, and no alteration, modification or repeal thereof, shall have any force until submitted to and approved by the said common council."

Sec. 9 gave the common council power as follows:

"The common council shall have power by ordinance to make and enforce all needful regulations for ascertaining the amounts to be paid as water rates by persons or corporations using the water, keeping accounts thereof, and giving the notices required by this act and by ordinances. It may provide for the payment of such water rates directly to the city treasurer, or for their collection by some subordinate of the board of public works, or a collector of water rates, to be appointed by said board of public works, and may require such subordinate or officer to give bond in such sum and with such sureties as it may prescribe."

By sec. 12 further power was given to the common council in these words:

"It shall be the duty of the said common council, and they are hereby empowered from time to time to pass such ordinances as may be deemed necessary or expedient to protect said waterworks and the use thereof, and to enforce the by-laws, rules and regulations of the said board of public works," etc., and to enforce all such rules and regulations by appropriate penalties.

Under the scheme of the charter service pipes, curb stops and all appliances for use of the consumer in taking water from the water main are required to be paid for by him.

March 8, 1901, the common council passed an ordinance containing provisions to the following effect: (1) A complete system of rates, arranged on the usual basis where water is not measured and also where it is measured by means of a water meter. Each consumer, by this system, was given the privilege of paying for water by the meter rate upon condition of his putting a meter in at his own expense and keep-

ing the same in repair, and not using water for his premises otherwise than through the meter, except those using water through a service pipe larger than three-fourths of an inch in diameter, who were required to supply their premises with meters at their own expense. (2) A scheme in detail for the collection of water rents and a prohibition against any change of water rates except under certain conditions, not recognizing any authority of the board of public works in the matter. (3) Regulations of the enjoyment of the water service, to prevent misuse thereof, such as the care and management of seals on standpipes and automatic sprinklers, conditions upon which water service might be re-established after being interrupted pursuant to the ordinances of the city or rules of the board of public works. (4) Penalties for wrongful interference with hydrants or stop cocks, or improper use of water contrary to such ordinance or rules. (5) Rules relating to the care of fire hydrants. (6) A declaration of authority to make other rules relating to water rates and collection of the same. Penalties for the violation of ordinances relative to the waterworks. A requirement regarding the management by consumers of their service appliances in case of an alarm of fire and during the continuance of a fire. A general repeal of all ordinances or parts of ordinances conflicting with the new enactment.

The ordinance was carried to the circuit court for La Crosse county for review, and was affirmed. The relator appealed.

For the appellant there was a brief by *McConnell & Schweizer,* and oral argument by *J. E. McConnell.*

W. F. Wolfe, for the respondent.

MARSHALL, J. Jurisdiction of the common council to pass the ordinance is challenged upon two grounds: First, because authority independently of the board of public works to fix rates was taken away from the common council by

ch. 162, Laws of 1887; second, because the charter does not grant authority to require consumers of water to measure the same through meters provided at their own expense.

We cannot escape the conclusion that the purpose of dropping out of the enumerated powers of the common council unlimited power to fix water rates and transferring initiatory authority in the matter to the board of public works, its action not to have the force of law till approved by the common council, was to make that method of dealing with the subject exclusive. Indeed, it does not seem that the legislative idea in the change is open to reasonable controversy. It is as plainly set forth as if a special law on the subject had been passed, giving to the board of public works power to fix the water rates, subject to the approval of the common council, and expressly repealing the existing law lodging such power absolutely in the council. The argument that, since the action of the board of public works is without force until approved by the lawmaking power of the city, its common council, inferentially such council has authority to take the initiative in the matter and legislate regardless of the board, is contrary to the settled doctrine that where the charter of a city provides the manner in which the will of the people shall be exercised, resort to any other method is usurpation. *Saxton v. Beach,* 50 Mo. 488; *Irvin v. Devors,* 65 Mo. 625.

It is said that the fixing of water rates is the exercise of legislative power and that the charter expressly makes the board of public works a mere executive body. Whether the fixing of water rates is so distinctly the exercise of legislative power as not to fall, in any reasonable view of it, within the scope of executive authority, and whether, if it is the exercise of legislative authority, it can be granted to a body of city officers elected by the people other than the city council, are questions not necessary to be considered. Granting all that is claimed on that branch of the case, so far as the principle thereof is concerned, it does not help respondent so far as we

can see, because the power of the board of public works to fix rates amounts to no more than authority to recommend by the adoption of a by-law embodying the judgment of the board, leaving the question of whether such recommendation shall have the force of law to the judgment of the common council in the exercise of its legislative authority. It cannot be doubted that the legislature may prescribe the conditions upon which a common council may legislate upon any matter, where all legislative authority is vested in it, and may limit the scope of its action. Taking the view most favorable to respondent, that is all that seems to be embodied in the charter under consideration. In effect, the common council is empowered to fix water rates only by acting upon the recommendation of the board of public works.

The provision in the ordinance permitting certain consumers to have meters at their own expense and requiring those using a service pipe larger than three-fourths of an inch in diameter to use meters, seems to be within the express powers given to the common council under the charter. As indicated in the statement of facts, in the general enumeration of the powers of the council, it is authorized to legislate by adopting such means as it may deem expedient to prevent waste of water and to protect and regulate the waterworks, and to enforce such legislation by suitable penalties. In the chapter devoted expressly to the subject of waterworks, by sec. 9 the council is empowered to legislate as to means for ascertaining amounts to be paid as water rates by consumers; and by sec. 12 it is empowered to legislate in its discretion for the *"protection of the works and the use thereof,"* and to enforce any and all of such legislation by suitable penalties. We do not doubt that under either the provision for the prevention of waste or the provision to make regulations for ascertaining the amount to be paid by consumers of water, the requirement contained in the ordinance for consumers, in certain cases, to use meters, and to provide

and keep them in repair at their own expense, is legitimate. It is a matter of common knowledge that the use of meters has a double purpose, and that the dominant one, as regards the party furnishing the opportunity to take water, is to prevent useless consumption thereof. Secondarily to that, and more for the benefit of the consumer than the party responsible for keeping up an adequate supply of water under proper pressure, is the measurement of the water. The consumer is burdened with the expense of providing a meter and keeping it in repair, but has the countervailing advantage, by the exercise of prudence in the use of the water, of paying only for the amount actually taken from the public supply, which, in most cases, by reasonable attention, can be made much less than what he would be required to pay by the schedule of rates where meters are not used.

The idea advanced by appellant's counsel, perhaps having some support in the authorities called to our attention, that a meter is a mere convenience solely for the party furnishing the water, is very wide of the mark. With as much propriety it might be said that the service pipe, curb-stop, or use of self-closing faucets and other appliances that might be mentioned, are mere conveniences for the party furnishing the water. They are necessaries, required as a condition of the consumer's taking water from the public supply, made so by such legislative authority as is contained in the charter before us,—that to prevent waste of water, to protect the use of the water service, and to prescribe the methods of determining the amount to be charged for water. The whole scheme of the charter is that the consumer shall bear all of the expense necessary to enable him to take water from the public supply. The service pipe, laid in the street from its connection with the water main to the curb stop, under the scheme of the charter, is required to be put in by the consumer or the owner of the property to be served.

We are unable to discover anything in the cases cited to our attention by appellant's counsel, when properly understood, seriously conflicting with the views above expressed. The question involved in *Red Star S. S. Co. v. Jersey City*, 45 N. J. Law, 246, was this: Can a city, under a system which contemplates that it shall pay all the expenses of procuring and distributing water to consumers, provide a water meter, locate it on property to be served, and compel a subsequent occupant of the property as lessee to pay for the meter as a condition of enjoying the water service? In deciding that question language was used upon which appellant's counsel rely, somewhat out of harmony with the conclusions here reached. We will not refer thereto at length. Much of it, if warranted at all by the facts of the case, is because of the peculiarities of the charter under consideration not found in that before us. It has this glaring infirmity: It refers to a water meter as a mere contrivance simply for use in distributing water so as to regulate quantity to price,—a contrivance merely for the convenience of the party furnishing the water. The fallacy of that is clearly shown in a case to which we will presently refer. If true in any view of the matter, it is only so as to large consumers. As to the great mass of them it certainly is not. In general, as we have said, the primary purpose of using water meters is to prevent the unnecessary use of water. Many consumers habitually abuse the privilege to take water. They may do it in a way extremely difficult to detect, and to greatly impair the efficiency of the water service for many purposes, fire protection and operation of motors being significant among them. Meters are used to guard against the danger of carelessness in leaving faucets and hydrants open when there is no necessity therefor. That idea was in mind in drafting the ordinance before us, as indicated by the provision that the use of meters by consumers using large service pipes was not left optional with them, while the use of meters on smaller pipes was so

left. The danger of unduly and unnecessarily reducing water pressure by open hydrants and faucets, especially on large service pipes, was deemed so great that meters were required, it being supposed, naturally, that as a rule open faucets or hydrants would not be allowed under a meter system when water was not needed. We apprehend that if the charter which the New Jersey court had under consideration had plainly indicated that consumers were expected to take water from the main supply pipe at their own expense and under such regulations and conditions as the city council might in its discretion see fit to adopt, broad powers being given to prevent waste, to preserve the use of the water system, and to make and enforce needful regulations for the ascertainment of the amount which consumers of water should pay for the privilege of drawing water from the water main, some expressions found in the opinion would not have been made.

In *Spring Valley Waterworks v. San Francisco,* 82 Cal. 286, 22 Pac. 910, 1046, another case referred to by counsel, the question decided was this: Is a requirement in an ordinance that the party furnishing water shall be at the expense of the meter to measure the water, and shall charge only for water actually used as indicated by the meter, a reasonable regulation, there being nothing in the organic law of the water company inconsistent therewith? Whether a requirement that consumers shall furnish meters at their own expense as a condition of enjoying the water service, under charter regulations such as govern the case before us, was not involved. The language of the opinion, "The expense of water meters could not be imposed upon the consumer," must be taken with reference to what was under discussion in the case. True, *Red Star S. S. Co. v. Jersey City,* 45 N. J. Law, 246, was cited, but we do not see that it has anything to do with the point under discussion. In any event, the delegated power exercised in passing the ordinance there under discussion was dissimilar in many material particulars to

that involved in this case. The question was whether the company might be compelled to bear the burden of putting in meters, not whether consumers might be compelled to bear such burden.

We find the general subject of whether a consumer of water can be required to measure what he takes from the public supply through a meter provided at his own expense, the corporation being authorized to charge meter rates, and its system contemplating mere permission to consumers to take water from its water mains, as in this case, was discussed at considerable length in *Sheffield Waterworks Co. v. Bingham,* L. R. 25 Ch. Div. 443. The conclusion reached was that it was competent for a water company, under the circumstances suggested, to impose upon the consumer the burden of providing at his own expense his water meter. The reasoning leading to such conclusion may well be adopted here. We quote from the opinion:

"The company are bound to put mains down in the streets. They are bound to keep those mains charged with water at high pressure, and having done that every householder in Sheffield is free either to make use of the water in that main or to decline to make use of it as he pleases. If he desires to make use of it, he himself makes the communications between his own house and the main, subject, of course, to all proper provisions for taking care that he does no injury to the waterworks company in making the connection; and subject also to this, that the connections must be properly made, so as not to abstract more water than he is entitled to take, and not to do any injury of any sort or description to the waterworks company."

The court, by Justice PEARSON, further reviewing the position taken,—that the water company, not the consumer, should furnish the meter; that if it charged meter rates it should measure the water at its own expense the same as a merchant in selling tea to his customer weighs the same out of his stock,—said, in substance: The argument is falla-

cious because, strictly speaking, the company does not furnish the water as a merchant furnishes tea. It provides a supply of water under pressure under such conditions that the consumer can, under its regulations, if he sees fit, connect an appliance of his own therewith and take water therefrom. In other words, the company furnishes the opportunity outside of the consumer's property line, at its water main, for him to supply himself with water. He takes it. He is granted the right to take it under certain conditions. The company, from the necessities of the situation, cannot know when he takes it. He is the only person in a position to measure the water, since he takes it whenever he likes and in whatever quantities he likes, under such conditions as may be prescribed to prevent his conduct from interfering with others enjoying the same opportunity. The company is entitled to have the measurement of what he takes made by him and in such a way that it will be reasonably protected from false measurements or reports. By the automatic method involving the use of the meter, that is accomplished. The consumer measures the water by the act of taking it, and informs the company of the result by exhibiting to it the register, which it can see only by his permission to come upon his premises for that purpose. The burden of the expense thereof is legitimately cast upon the consumer as a condition of his enjoying the privilege of taking water from the source of supply at his disposal.

A contrary view is favored in an article found in 27 Am. Law Reg. (N. S.) 277–283, reference being there made to *Sheffield Waterworks Co. v. Carter,* L. R. 8 Q. B. Div. 632, which is not entirely without warrant, there being some language used in the opinion in that case and in the syllabus thereto inconsistent with what was decided in the later case. But Justice PEARSON, in writing the later opinion, reviewed at length and critically analyzed all that was said on the subject in the former case, and concluded that it did not decide

the point which was the precise one at issue in the case before him. He said:

"I can only say, having given a good deal of attention to this case, that I believe the learned judges who decided that case would all think I was erring very greatly indeed, and charging them with something they never intended to do, if I were to come to the conclusion that they had any notion of deciding the question which is before me to-day."

A point is made that the meter requirement in the ordinance fatally discriminates against consumers using large service pipes, in that it imposes upon them the burden of procuring a meter, while it leaves the matter of using a meter by others optional. We are unable to say that as a matter of law the classification of consumers thus made is unreasonable. The power vested in the council to protect the use of the waterworks is discretionary in character and conferred in broad general terms. It would require a very plain case of abuse of power in not giving equal opportunities to all to take water under like conditions and circumstances, to warrant the court in interfering in such a case as that presented by the ordinance in question. We can see a good reason why there are dangers to be guarded against where water is taken from a water main through a large service pipe, which, if they exist at all, do not to the same extent where a small service pipe is used. The different conditions may and probably do justify the classification made in the ordinance.

From what has been said, that part of the ordinance under consideration relating to meters, and everything in it except the matter of fixing rates, were proper subjects for legislation by the common council independently of the board of public works. The requirement for meters being valid, a schedule of rates to be applied to meter measurements was necessary. It was the duty of the board of public works to take the matter in hand and by a proper by-law submit its conclusion to the common council for approval. That such method of treat-

ing the matter was necessary to a legal establishment of the meter rates, we have no doubt. But, since there is nothing inequitable that we can see in the rates fixed by the ordinance, and it was the duty of the board to adopt a by-law on the subject, and in the end no rates could have been established not approved by the common council,—no other rates than the ones which the council adopted unless they consented,—there is nothing in the ordinance inflicting any real injury upon the relator. At most there is a fatal irregularity from a legal standpoint, in doing that which might have been done legally by observing strictly the charter method. From the standpoint of equity, that occupied by the court in granting or denying the use of a discretionary writ, relator is not injured at all by the ordinance complained of. As regards any pecuniary injury that could in any event have been inflicted upon him, it is believed that it would be trifling as compared with the disturbance of public affairs which would result from allowing every individual member of a city community, upon every trifling pretext involving the validity of an ordinance, to force it to defend its jurisdiction before the courts upon a common-law writ of *certiorari*. After careful consideration of the matter we have concluded that it is an abuse of judicial discretion to allow the writ of *certiorari* in such a case as is here presented. The mischief that might result from a rule permitting every individual, not smarting under any substantial injury, nor any not remediable by ordinary methods, to make the court, in effect, a sort of upper house, to review all jurisdictional matters in municipal legislation, involving matters not of a really prejudicial character, is very great. The law is well settled that a suitor has no absolute right to a remedy by common-law writ of *certiorari*. When to permit and when to deny the use of it rests in the sound discretion of the court. Even on appeal to this court, after the lower court has allowed such use, it is proper, where its action seems plainly wrong, upon a reversal of the judg-

ment to remand the proceedings with directions to dismiss the writ. *Knapp v. Heller,* 32 Wis. 467; *State ex rel. Schintgen v. La Crosse,* 101 Wis. 208, 77 N. W. 167. The common rule is that where the relator shows no equity, and, so far as his legal rights go, no injury not remediable at law, it is proper to deny the use of the writ. It is considered that the cases cited voicing the doctrine of this court establish the rule to be also that, where there are these additional elements to those above mentioned,—a private individual upon the one side as relator, with a trifling injury, if any, to be redressed, and that remediable by ordinary means, and the public on the other,—it is an abuse of discretion to permit the use of the remedy.

The logical result of the foregoing is this: The trial court should have considered the use of the writ, under the circumstances of this case, as presenting a question of its own jurisdiction, and quashed the proceedings with or without a motion to that effect, as the circumstances required. Having proceeded to decide the matter presented on its merits, it should have sustained the jurisdiction of the common council only as to those portions of the ordinance that do not deal with the subject of fixing rates, and that only upon the ground that such portions are separable from the balance of the ordinance. It is considered that they are separable. As the matter stands now the judgment is erroneous, and it seems best that it should be reversed *in toto* and the cause remanded with directions to dismiss the writ.

By the Court.—So ordered.

CHRIST, Respondent, vs. DAVIDSON, Appellant.

January 17—February 3, 1903.

Actions: Voluntary appearance: Default: Judgment of another state: Collateral attack: Scope of pleading.

1. Where there is no question as to the jurisdiction of the subject matter by the court in Ohio where a judgment was rendered against defendant, in an action thereon in Wisconsin, a finding that defendant voluntarily appeared in the prior action is supported by a writing, being part of the records of the foreign action, signed by defendant, declaring his appearance, and sent to plaintiff's attorney for the obvious purpose of being filed.
2. In an action on a foreign judgment it appeared, among other things, that one count in the petition filed therein set out the execution of a note and mortgage by defendant to a third party, and their transfer by an indorsee to plaintiff as collateral for a sum less than the face of the note. Judgment was demanded for the face of the note, which prayer was reiterated at the close of the petition, with the further prayer that the proceeds of the mortgaged property be paid to plaintiff, to the extent of his claim, and the balance to plaintiff's assignor. Defendant entered an appearance in writing, after which plaintiff's assignor appeared as defendant, adopting the petition throughout as his answer, "and the prayer thereof." Judgment of foreclosure and sale was taken on default, followed by sale, distribution of the proceeds by order of the court, and personal judgment in favor of plaintiff's assignor and against defendant for the deficiency. *Held*, that the petition contemplated a personal judgment against defendant, and that the judgment rendered, and on which action was brought in Wisconsin, was entirely responsive to the prayer and no wise exceeded the relief which defendant must have known was demanded, had he concerned himself to examine the petition filed in the action in which he voluntarily appeared.
3. In such case, there being no lack of jurisdiction, either of the subject matter or of the person, the validity of the foreign judgment was not open to attack.

APPEAL from a judgment of the circuit court for Trempealeau county: J. J. FRUIT, Circuit Judge. *Affirmed.*

Action to recover upon a judgment in favor of the plaintiff and against the defendant, rendered by the court of common pleas of Lawrence county, Ohio,—a court of general jurisdiction. The record of the action in that court disclosed a petition by the Blackford County Bank, as plaintiff, against *Arch P. Davidson* and Laura A. Davidson, as defendants, which alleged that said defendants executed their note for $2,000, payable to the order of Mattie Crist, which, before judgment, and for value, had been duly indorsed and transferred to *William F. Christ,* and by him, in due course of trade, for consideration of $600, duly assigned and indorsed to the plaintiff bank as collateral security for said sum. The petition also set up the execution of a mortgage to secure said note; and the plaintiff prayed judgment against the defendant *Arch P. Davidson,* for the amount of said note; also for the foreclosure of the mortgage, and sale of the mortgaged premises, and for payment to it of $600, and of balance to *William F. Christ.* When about to commence this action, the plaintiff's attorney wrote the defendants of the fact of the commencement of an action to foreclose that mortgage, and sent them, for signature, what he called a "waiver," in order to avoid expense of giving notice by publication. The defendants signed and sent to him a paper in the following words: "We, and each of us, do hereby waive the issuing and service of summons in this action, and also service by publication, and voluntarily enter our appearance herein,"—which paper was filed in the court of common pleas, and upon which that court recited in its judgment that such defendants had voluntarily entered their appearance. After the commencement of the action, and before judgment, the respondent *William F. Christ* appeared as a defendant to the foreclosure action, and filed answer in which he declares that he "adopts as his answer in this action each, every, and all the allegations of plaintiff's petition, and the prayer thereof." Judgment was entered by that court for the recovery of the

whole amount of the note in favor of *Christ,* and for foreclosure and sale of the mortgaged premises, and the application of the proceeds upon the judgment; the first $600 thereof to be paid to the plaintiff bank. Sale was had at the amount of $1,000, and was distributed, by order of the court, for the payment of costs and taxes, and all the indebtedness of *Christ,* to the bank, and the balance of the judgment ascertained, of $1,410.75, for which execution was awarded against said *Arch P. Davidson.* The trial court found substantially these facts, and that the defendant voluntarily entered his appearance in writing in said court of common pleas, whereby jurisdiction over his person was conferred upon the court of common pleas, and rendered judgment in favor of the plaintiff and against the defendant for said balance of $1,410.75, ascertained by that court, together with interest thenceforward, from which judgment defendant appeals.

C. W. Gilman, for the appellant.

For the respondent there was a brief by *Richmond & Richmond* and *Higbee & Bunge,* and oral argument by *E. C. Higbee.*

DODGE, J. The facts of the present case leave but little room for dispute upon legal propositions. The only questions open upon attempted collateral attack upon any judgment are whether the court, in its rendition, had jurisdiction of the subject-matter and of the attacking party. No question is raised upon the jurisdiction of the court of common pleas of Ohio generally over actions to recover upon promissory notes, and to foreclose any mortgage securing the same. Jurisdiction of defendant's person depends in this case on the fact that he voluntarily appeared in the action. Such fact has been found by the circuit court, and the finding has support from a writing signed by him, declaring such appearance, sent to plaintiff's attorney, at his request, for the obvious pur-

pose of being filed. Some attempt is made to assert that this paper was fraudulently obtained. Such contention is negatived by the finding of the trial court, against which we certainly find no clear preponderance of evidence. This would seem to settle the matter, but appellant argues that the jurisdiction over his person thus conferred was only for the purposes of the action pending, as measured by plaintiff's pleading called the "Petition," which he asserts did not contemplate any personal judgment, and especially none in favor of the present plaintiff, *Christ*. It might be interesting to examine how far construction of pleadings, and adjustment of relief thereto, is within the jurisdiction of a court upon default, and whether a mistake therein is mere matter of error, examinable only on direct attack, or a wandering outside of jurisdiction, so as to be reviewable collaterally; but in this case we find nothing of either. The petition set forth the indebtedness on the note payable to *William F. Christ,* and belonging to him, except for the interest of $600 therein belonging to the plaintiff bank, and, upon the first cause of action, prayed judgment for the amount alleged to be due thereon, which prayer was reiterated at the close of the petition, with further prayer that the proceeds of foreclosure sale be applied, $600 and interest thereon to the plaintiff bank, and the remainder to *Christ*. Thus the petition clearly contains a prayer for personal judgment against this appellant, and in such form as to protect the rights alleged. Those rights are recovery by *Christ* of the whole debt, except as $600 and interest must be awarded the plaintiff bank. Such is the judgment rendered, and now sued on. It is entirely responsive to the prayer, and in no wise exceeds the relief which appellant must have known was demanded, had he concerned himself to examine the petition filed in the action to which he voluntarily appeared. No lack of jurisdiction, whether of the subject-matter or of the person of the defendant, appearing, the validity of the judgment sued on cannot

be attacked otherwise in this action, and such record establishes appellant's indebtedness and fully supports the judgment now appealed from, which, therefore, is correct.

By the Court.—Judgment affirmed.

RUEPING, Respondent, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

January 14—February 24, 1903.

Railroads: Negligence: Personal injuries: Master and servant: Gross negligence: Punitory damages: Compensatory damages: Appeal: Prejudicial error: Measure of damages: Excessive damages.

1. Where a person is liable in compensatory damages for personal injuries wrongfully inflicted by his servant while in the performance of duties as such servant, the principal cannot be visited with damages by way of punishment without proof that he directed the wrongful act to be done, or subsequently affirmed it.
2. In an action for personal injuries wrongfully inflicted by defendant's servant while in the performance of his duties as such servant, in the absence of proof that the principal has authorized or ratified the wrongful acts, proof of the degree of negligence, as to whether ordinary or gross, is improper and should not be submitted to the jury.
3. In an action for personal injuries inflicted by defendant's servant while in the performance of his duties as such servant, where actionable negligence is admitted, and there can be no punitive damages, because the principal did not authorize or affirm the wrongful act of the servant, evidence of the circumstances of the injury are irrelevant and immaterial, unless of such special nature as to present, as one of the elements of compensation, sense of wrong or insult arising from an act apparently dictated by a spirit of wilful injustice, or a deliberate intent to vex or degrade.
4. In an action against a railroad company for personal injuries caused by a collision, actionable negligence was admitted.

Punitory damages could not be recovered because negligence of defendant's servants was not shown to have been either authorized or approved by it. Plaintiff's counsel throughout the trial made contentions (with which the rulings of the court were in harmony) that the defendant was guilty of gross and criminal negligence; that mere compensation to plaintiff, in view of the enormity of defendant's fault, would be inadequate, and appealed to the jury to fix compensatory damages with regard to defendant's ability to respond. *Held*, that although the jury found there was no gross negligence, the erroneous admission of evidence of gross negligence was prejudicial error.

5. In an action for personal injuries suffered in a railroad collision it appeared, among other things, that plaintiff, a man forty-five years old, engaged in office work, suffered a compound fracture of his leg below the knee; that there was no evidence of great pain, or of probable future suffering; that recovery had been rapid; that he was able to attend to his business substantially as before, and that his only permanent difficulty was a looseness in the knee joint, permitting a slipping outward as the weight of the body was thrown upon the imperfect limb. *Held*, that a verdict for $12,000 damages was largely in excess of what was warranted by the evidence and the law, and that a new trial should be granted unless plaintiff remitted all damages in excess of $2,500.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action to recover for personal injuries. The claim of the plaintiff was that, June 24, 1900, he was a passenger on defendant's excursion train on the way from the city of Fond du Lac to the city of Green Bay in the state of Wisconsin; that through gross negligence of defendant's servants who controlled the movement of said train it collided with one of defendant's freight trains, by reason whereof plaintiff was severely injured; that his injuries consisted of a severe shock to the system, both bones of his right leg being transversely fractured from the knee down, the nerves and muscles of his body, particularly those of his right leg, being injured, and his being put to great pain and permanently physically impaired, to his damage in the sum of $15,000.

The answer admitted that plaintiff was injured at the time alleged by ordinary negligence of the defendant, but denied that it or its servants were guilty of any greater degree of fault than mere failure to exercise ordinary care. It put in issue the extent of the physical injury and the amount of the damages alleged.

There was no allegation in the complaint that defendant was at fault except in that its servants failed to exercise proper care. There was no allegation that it authorized their conduct or ratified it. The allegations as to gross negligence went no further than to charge that the servants of defendant, while in pursuit of their ordinary business of managing the excursion train and the freight train, were grossly negligent. In the opening address of plaintiff's counsel to the jury he treated the subject of gross negligence as the all-important one to be dealt with by them, and in a manner well calculated to inflame their minds with prejudice against the defendant on account of guilt in operating its trains on the occasion in question with reckless disregard of human life. He stated clearly that the difference between the claim of plaintiff and that of defendant, as regards the mere question of liability, was respecting the degree of its fault,—whether it was merely guilty of ordinary negligence or was guilty of gross negligence. Defendant's counsel, in his opening address to the jury, took issue with plaintiff's counsel as to there being any question of gross negligence in the case. He insisted that there was on trial merely a case of accident from ordinary negligence, where the fault was freely admitted, and the only question for decision was the amount that should be awarded plaintiff as compensatory damages. He suggested that there was no disposition on his side to escape payment of any part of such sum as in the judgment of the jury, guided by the evidence and the law applicable thereto, should be deemed necessary to fully compensate plaintiff for his loss; that de-

fendant desired that plaintiff should receive his full legal measure of damages.

Upon the trial plaintiff's counsel was permitted, against objection, to introduce evidence at great length upon the subject of defendant's negligence, and particularly to establish the claim that its servants were guilty of gross negligence. Defendant's counsel insisted from the beginning to the end of the trial that, since defendant freely admitted its liability for ordinary negligence,—the only degree of fault actionably charged in the complaint,—evidence other than to aid the jury in coming to a correct conclusion respecting the amount of money necessary to compensate plaintiff for the injuries received was improper. Plaintiff's counsel, though pressed by defendant's counsel to make his position plain before the court, in order that the court might rule intelligently upon the objections to evidence, did not distinctly claim that a recovery could be had under the complaint for gross fault. During the discussion of the various objections language was indulged in at great length by plaintiff's counsel to the effect that defendant was guilty of criminal negligence and that plaintiff was entitled to damages by way of punishment.

The court, by the rulings made at all points during the trial in respect to the subject of gross negligence and permitting the conduct of plaintiff's counsel indicated, allowed him to succeed in placing before the jury evidence to sustain his claim that the defendant's servants, in the handling of the passenger train and in directing its movements, were guilty of gross negligence. When the case was ready to submit to the jury there was no fact in issue on the pleadings in controversy on the evidence in a way to charge defendant with legal liability. The only disputed questions were whether plaintiff was permanently injured, and the amount of money that should be paid to compensate him for his loss.

The case was submitted to the jury for a special verdict. The first two questions covered the controverted matters men-

tioned. They were followed by six other questions covering various elements of actionable negligence, ordinary and gross. Instructions were given in respect to each of such questions. The jury found for the defendant as to the claim of liability for gross negligence, answered the questions respecting ordinary negligence in favor of plaintiff and assessed his damages at $12,000. Judgment was entered on the verdict in plaintiff's favor. All matters referred to in the opinion that follows were preserved for review by proper exceptions.

Edward M. Hyzer, for the appellant.

For the respondent the cause was submitted on the brief of *Edward S. Bragg.*

MARSHALL, J. This case from first to last was tried upon a wrong theory. Counsel for appellant was clearly right in his position that upon the pleadings the only questions for decision by the jury were these: (1) Are the plaintiff's injuries permanent? (2) What sum of money will compensate him for his loss? Those questions, with proper explanations to enable the jury to understand their scope and the legal principles governing the same, would have covered all the matters required to be solved to settle the controversy between the parties. It may be that the learned counsel for plaintiff really supposed that his client was entitled upon correct legal principles to show all the circumstances of the accident. It may be that he did not consciously lead the learned circuit judge astray by his attitude, suggesting expressly or by implication that under the pleadings respondent was entitled not only to show gross negligence on the part of defendant's servants, as bearing on the question of compensatory damages, but for the purpose of charging appellant with punitory damages, notwithstanding there was no claim in the complaint or in the evidence that defendant authorized the acts complained of or ratified them. However, it would be a reflection upon the distinguished counsel for respondent, which

we hardly feel justified in suggesting, to treat this case as if he was misinformed in respect to the fact that the settled judicial policy of this state is to the contrary, and has been for some over forty years. While if the duty devolved upon us now to demonstrate the correctness of such policy, tested by principle and authority, it would not seem to be a specially difficult task, we shall not enter into any discussion thereof, since the matter has been settled by a long line of adjudications of this court. In *Milwaukee & M. R. Co. v. Finney,* 10 Wis. 388, decided in 1860, it was held that though a person is liable for compensatory damages for injuries wrongfully inflicted by his servants upon another while in the performance of their duties as such servants, the principal cannot 'be visited with damages by way of punishment without proof that he directed the wrongful act to be done or subsequently affirmed it; that without such authorization or ratification the degree of negligence, as to whether ordinary or gross, has no proper place in the controversy as to the measure of the plaintiff's right to redress and should not be submitted to the jury.' The same principle, so far as applicable, ruled *Bass v. C. & N. W. R. Co.* 36 Wis. 450; *S. C.* 42 Wis. 654; *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Eviston v. Cramer,* 57 Wis. 570, 15 N. W. 760; *Patry v. C., St. P., M. & O. R. Co.* 77 Wis. 218, 46 N. W. 56; *Mace v. Reed,* 89 Wis. 440, 62 N. W. 186; *Robinson v. Superior R. T. R. Co.* 94 Wis. 345, 68 N. W. 961; *Bryan v. Adler,* 97 Wis. 124, 72 N. W. 368; *Gaertner v. Bues,* 109 Wis. 165, 85 N. W. 388. In all the later decisions of the court such principle was deemed so firmly established that a mere reference to the previous adjudications was all that was deemed necessary in applying the same. In *Robinson v. Superior R. T. R. Co.* this language was used:

"This court has repeatedly held, in effect, that exemplary damages can only be recovered against the principal for the

wrongful and malicious act of the agent, when such act is either authorized or ratified by the principal."

In *Gaertner v. Bues,* this language was used:

"There is no finding that such acts were authorized or ratified by the defendant. Without this, there can be no recovery as and for punitory damages. Such damages are given only by way of punishing the malice or oppression, and are usually graduated by the intent of the party committing the wrong. When the action is against the principal for the act of an agent, the question of their assessment cannot properly be submitted to the jury, unless there is evidence connecting the principal with such intent on the part of the agent."

Counsel occupied considerable space in his brief in arguing that a principal is responsible for the negligence of his agent in the pursuit of his duties resulting in an injury to another, and therefore that, necessarily, on principle and authority, all the circumstances attending the act may properly be shown in an action to recover for the wrong, whether the proper measure of damages be such as will merely compensate such other for his actual loss or the jury be permitted in their discretion to allow an additional sum by way of punitory damages. True, a principal is responsible for gross negligence under the circumstances stated. That is supported by all the cases cited. But not responsible for more than compensatory damages without the element of authorization or ratification by him. The measure of damages is the same without such element, whether the degree of fault be ordinary or gross negligence. So, in such case, the circumstances of the injury are entirely immaterial where actionable negligence is admitted, unless they are of such special nature as to present, as one of the elements to be compensated for, sense of wrong or insult arising from an act apparently dictated by a spirit of wilful injustice or a deliberate intent to vex or degrade. It is held that mental suffering of that character is a proper subject for compensatory damages (*Grace v. Dempsey,* 75

Wis. 313, 323, 43 N. W. 1127; *Duffies v. Duffies,* 76 Wis. 374, 386, 45 N. W. 522); that all mental suffering, coupled with physical injury—that form which springs merely from insult or wilful wrongdoing as well as that caused by physical pain—is in a proper case a legitimate subject to be considered in awarding compensatory damages. The cases holding generally that the circumstances attending the infliction of an injury in an action to recover compensation therefor are material regardless of whether liability is admitted, are not universally restrained by the language of the opinion within their legitimate limits. It seems that it needs only to be suggested that evidence of gross negligence, where there can be no punitory damages as matter of law, or damages for mental suffering caused otherwise than by physical injury, is irrelevant; that it is liable to be prejudicial where, in the very nature of things, it is plain that there was no mental suffering induced by insult to be compensated for. Counsel calls our attention to the opinion of Mr. Justice DAVIS in *Milwaukee & St. P. R. Co. v. Arms,* 91 U. S. 489, where this language is found:

"As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea, that compensation alone is the true measure of redress."

An examination of the entire opinion will show that the materiality of intention which the court was talking about was in respect to whether the defendant was liable for punitory or only compensatory damages. As an abstract proposition it seems too elementary to warrant any very extended discussion, that as regards any element of compensable injury except mental suffering caused by insult or something of that sort, the intent of the wrongdoer neither enhances nor

mitigates the loss. There was no attempt here to recover for any such element. The circumstances of the case show that no such element entered into it. Therefore, there was clearly no justification for presenting the subject of gross negligence to the jury for consideration.

We cannot, in justice to the learned circuit judge who presided at the trial and the distinguished counsel for respondent, omit to notice *Lawson v. C., St. P., M. & O. R. Co.* 64 Wis. 447, 24 N. W. 618, to which counsel refers us. The opinion there, taken as it reads, justifies the conduct of the trial. However, it seems that no such effect should be given to the case. There was no claim in the complaint there of liability for gross negligence. The essential allegation to support such a claim was wanting. There was no proof offered or received, so far as we can discover in the report of the case or the printed matter used upon the argument, suggesting gross negligence. There was no element of injury of a compensable character that would not have existed regardless of whether the fault of the defendant was ordinary or gross negligence. Yet, the trial court, misconceiving what constitutes gross negligence—not understanding that it requires actual intent to injure, or that disregard of human life or of consequences evincing a willingness to produce harmful results, sometimes called intent in law and equivalent to intent in fact (*Ryan v. La Crosse City R. Co.* 108 Wis. 122, 83 N. W. 770; *Milwaukee & St. P. R. Co. v. Arms,* 91 U. S. 489)—directed the jury to convict the defendant of such fault because, as was said, the evidence established it, and the measure of damages was no greater than would have resulted from ordinary negligence, the degree of fault admitted in the answer. The error was not harmful, because there was nothing in the case upon which the court predicated his decision tending by reason of the ruling to enhance the recovery, and the jury were distinctly restrained, in assessing the damages, to such compensation as would fairly remunerate the bene-

ficiary of the cause of action for her pecuniary loss. This language was used in deciding the case:

"The respondent was allowed to show the circumstances of the collision, against the objection of the appellant, in order to show that the servants of the company were guilty of *gross* negligence. According to the brief of the learned counsel of the appellant, 'it made no difference in the case so long as defendant was negligent. If plaintiff showed herself otherwise entitled to recover, she could only be defeated by showing negligence on her husband's part.' This being so, proof of gross negligence was immaterial and could do no harm. But we think proof of the accident and its circumstances was proper, and that it justified the finding of gross negligence. The negligence of the company was charged in the complaint and admitted in the answer, but its degree was an open question for the jury."

Since, as the court said, in effect, whether the wrong of the defendant was characterized by the essentials of gross negligence was immaterial to the case, and ordinary negligence was charged and admitted, rendering defendant liable for full compensatory damages to the beneficiary of the cause of action, and there was no other element of compensable loss involved than such as was of a distinctly pecuniary character, we must confess that the court was wrong in saying that the degree of the defendant's fault was a proper subject for proof and for consideration by the jury. It seems that the furthest the court should have gone was to have said that, the liability of the defendant for the pecuniary loss suffered by the widow of the deceased being admitted and the jury having been limited in the assessment of damages to such elements, evidence respecting the circumstances of the injury was unnecessary, and, as regards mere degree of negligence, was error, but harmless error.

We will say in passing that we do not lose sight of the language called to our attention in *Bass v. C. & N. W. R. Co.* 36 Wis. at page 462, to the effect that the mere inadvertent placing of a railway train in charge of negligent or careless

agents, or that any negligence by the agents of a railway company in charge of one of its trains, "may well deserve the epithet of gross." In view of the long line of decisions in this state regarding the essentials of gross negligence, it would hardly seem that such language, quoted, as it was, from another jurisdiction, and used merely *arguendo,* should be referred to as authority.

Counsel for respondent insists that if it was error to admit evidence of gross negligence of defendant's servants and to try the case on the theory that defendant might be guilty of that degree of fault, it was not prejudicial error, because the finding on that was in its favor, citing *Stone v. C., St. P., M. & O. R. Co.* 88 Wis. 98, 59 N. W. 457. That would be true if there were no indications in the record that defendant was prejudicially affected notwithstanding. A universal rule cannot be predicated on *Stone v. C., St. P., M. & O. R. Co.* and similar cases. The question of whether error of the sort in question is harmful or not must necessarily be determined very largely by the facts of each particular case.

The persistence with which counsel for respondent, from his opening address to the jury till the case was finally submitted to them, contended that appellant was guilty of criminal negligence and that mere compensation to plaintiff for his loss would be inadequate to the enormity of its fault, and the extent to which rulings were made in harmony therewith, could hardly have resulted otherwise than to unfit the jury to fairly consider and decide the vital issues in the cause. Such conduct of the trial went to an extraordinary length. A few excerpts from the record will amply show that. Speaking of the responsible officers of the defendant, who were entirely innocent of any criminal fault or moral turpitude, or personal fault at all, this language was used by the learned counsel:

"If Puck were to publish a cartoon of these distinguished gentlemen in procession on that Sunday as they came from church—I have no doubt they were all at church—Wall street

was not running that day—he would picture this long line of mourners and grievous characters with tears dropping down from their eyes, and put under it what they sometimes do to give point to the caricatures, 'We wonder what this will cost.' Then it will be left for anybody else to determine what they meant when they said, 'We wonder what this will cost,' and whether it was the tears that were shed for what it might cost, or whether the tears were shed because they had got caught once when it was apparent that they would be held responsible."

The great wealth of the defendant and the amount of money damages requisite to be visited upon it in order that it might feel the smart of the legal lash and be conscious of the enormity of its offense, was treated in part thus:

"These impositions by way of fine for example's sake, punishment's sake, to operate as a warning to protect the body politic that travel to and fro, in this case over railroads—the same rule that applies outside of railroads applies here—correspond the punishment that you impose with the ability to pay the money that you impose and then you have an easy, graded movement—as easy as you ever can have—in fixing either compensatory or exemplary damages. . . . Now as a public example, in the way of punishment, how much more, how many more thousand in addition shall you give, so that when the blister is administered, it will draw. That is what we want for example's sake and for punishment's sake."

Note the appeal to the jury to fix compensatory damages, having regard to the ability of the defendant to respond. What justification can there be suggested for conduct so calculated as that to inflame and pervert the minds of an ordinary jury assembled to perform so simple a duty as that of determining the money damages necessary to compensate for loss suffered; or for the use in addressing the jury of language like this respecting the circumstances of the accident:

"As I said to you, some were launched into the other world; others had legs broken or ribs broken; every ailment, very nearly, that could be inflicted upon them came upon them. They spent their summer in pain and misery; and be-

came thence, some of them, as I think I shall show you, . . . crippled for life."

Or this language in respect to the engineer who handled the train:

"Ran in upon that engine, crashed there in its force and rebounded, one car telescoping into another, sending, as we have shown, five or six unshrived souls to their Maker, and left a large number, whatever that number may be, crippled for life."

Pages might be covered in presenting a full history of the trial with expressions of the same sort, tending to unfit any ordinary jury for doing justice in the case.

It is with much regret that we are, in the discharge of our duties, required, as above, to give even a few glimpses of the unhandsome features of the trial of this case. It is to be regretted that counsel so distinguished should have so indulged his personal mastery of a situation as to lead so conscientious a judge as the one who presided upon this trial so far astray. It is to be regretted that counsel will do that under any circumstances. Counsel should never forget that they are of the instruments provided by law for the administration of justice,—officers, as it were, in the eye of the law, charged with a high degree of responsibility respecting the protection of the rights of their clients within the legitimate boundaries of the controversy they are called upon to present for adjudication, and charged as well with a high degree of responsibility not to purposely or negligently go outside such boundaries. Within that sphere they may, with all their learning, ability and industry, present their client's claim; but they will step outside thereof at the peril of sacrificing the very interests they are in duty bound to safeguard.

From what has been said we must conclude that there was not a fair trial of this case. If it appears probable that the verdict was enhanced thereby, the judgment must be reversed. The jury found for the defendant on the question of gross

negligence. That is a point in favor of the judgment. However, as counsel for defendant suggests, there is a strong indication in the amount of the verdict that, while the jury acquitted defendant of gross negligence, they were ruled by the idea pressed upon them throughout the trial that damages should be assessed sufficiently high to roundly punish the defendant when they came to assess the plaintiff's compensatory damages. The indications are that the idea of damages as mere compensation for loss sustained was too involved in their minds with the idea of punishing appellant to enable them to intelligently or dispassionately pass upon the vital questions in the case.

The evidence as regards the nature of the plaintiff's injury and the result was to the following effect: The large bone of the right leg below the knee was broken transversely downward. There was a displacement, giving the injury the character of what is called a compound fracture. It was not specially painful. Plaintiff recovered, so far as probably he ever will recover, in a few months. He was forty-five years of age when injured. His business was mainly office work. He was sufficiently restored to enable him to attend to such business substantially as formerly. The restored limb is not quite as strong as before. It is not wholly in its normal condition and never will be. The ligaments at the knee joint are so impaired that the joint is more than normally mobile. That permits a slipping outward as the weight of the body is thrown upon the imperfect limb. He is required, in using his limb, to use care and favor the impaired member. He has not full control of the limb because, as indicated, the ligaments of the knee are to some extent permanently relaxed. He testified that his only difficulty in using his limb was that there was a looseness in the knee joint permitting the leg to bow out about an inch as he threw his weight upon it, and that it troubled him some in moving about.

An examination of the numerous cases that have come to this court furnishes clear indication that $12,000 for the loss above indicated is far beyond what is legitimate. Plaintiff was not prevented from going about his customary affairs more than six months. There was no special circumstance distinguishing the injury from that of an ordinary compound fracture of one of the legs below the knee. There was no extensive laceration of the tissues of the limb. There was no extraordinary amount of pain suffered. There was a pretty rapid recovery, and a complete healing of the wounds. The permanent impairment of earning power is not large. There is no evidence of reasonable certainty of future pain and suffering from the injury. The amount awarded is equivalent to an annuity sufficient to enable plaintiff, with an ordinary family, to live in ordinary circumsfances during his natural life. The mere statement of that is sufficient to demonstrate that the verdict is unreasonable in a high degree. A reference to verdicts in other cases will be of some service in determining how far the one in question is out of harmony with what is reasonable; but there is, after all, no test to be applied but that of human judgment. An examination of a large number of cases fails to bring to our attention one where anywhere near as large a verdict as the one before us has been sustained for a similar loss. Instances may be found in our books where there was the loss of a leg, with suffering probably as great as that of plaintiff, and where there was as great or greater diminution of earning power, and the amount of compensation allowed was from $1,600 to $5,500. In *Karasich v. Hasbrouck,* 28 Wis. 569, there was a verdict for $5,500. The plaintiff, a man twenty-eight years old, had two ribs broken. One leg was so badly bruised and wounded that pieces of the bones subsequently worked out through the wound. He was confined to his bed for some days, was under a surgeon's care for months, and was rendered permanently disabled from following his usual occupation, and made rea-

sonably certain to suffer considerable pain for the rest of his life. In *Duffy v. C. & N. W. R. Co.* 34 Wis. 188, a strong, healthy man sixty-four years of age was very severely and permanently injured, the injury leaving him to some extent a cripple for life. The amount of damages awarded was $1,600. In *McMahon v. Eau Claire W. W. Co.* 95 Wis. 640, 70 N. W. 829, $5,000 was allowed for a severe permanent injury to a young man, a member of the city fire department. In *Cummings v. National F. Co.* 60 Wis. 603, 18 N. W. 742, 20 N. W. 665, a middle-aged man was rendered helpless for life. The amount awarded to him was $8,000. In *Propsom v. Leatham,* 80 Wis. 608, 50 N. W. 586, a laborer in good health, with a good prospect of long life, was seriously and permanently injured, one of his legs being broken, and after he was cured so far as practicable, the leg being left in a partially deformed condition, was awarded $1,800. In *McCoy v. Milwaukee S. R. Co.* 88 Wis. 56, 59 N. W. 453, the sum of $4,000 was awarded for the loss, by a boy seventeen years old, of his left arm. In *Baltzer v. Chicago, M. & N. R. Co.* 89 Wis. 257, 60 N. W. 716, a recovery of $10,000 was allowed for loss of the left arm of a boy nineteen years of age. In *King v. City of Oshkosh,* 75 Wis. 517, 44 N. W. 745, $600 was allowed to compensate a man for an injury causing considerable expense, loss of time, and a somewhat permanent impairment of earning power. In *Nadau v. White R. L. Co.* 76 Wis. 120, 43 N. W. 1135, $9,650 was allowed for an injury to a strong young man. His leg was crushed and had to be amputated above the knee. These examples, though including cases of injuries quite dissimilar in kind to the one suffered by paintiff, furnish a pretty good index of the amount usually found necessary in the administration of justice, to compensate for pain and lost time incident to an injury and impaired earning power. We may well look, not so much to the particular nature of the injury in the cases, in comparing them with the one before us as to the magnitude

of the elements of pain, loss of time, expense, diminished earning power, and the age of the subject. Those cases strongly support our conclusion that the verdict of the jury here was either the result of passion and prejudice or that the case was not intelligently considered by the jury; that they were swung away from the true basis for the assessment of damages by the errors we have discussed; that they thought as much or more of roundly punishing the appellant as of requiring it to make good to respondent the loss he sustained, upon a common-sense basis.

There being no controversy but that appellant is liable to respond for compensatory damages, this is a proper case for this court, upon reversing the judgment, to name a sum which the plaintiff may accept and terminate the litigation if he sees fit. We will do that, being guided by the rule that, since defendant is left with no option in the matter, in order to avoid invading its substantial rights as to a judicial assessment of the damages it should pay, the sum named must be as low as in any reasonable probability a jury of twelve men rightly instructed as to the law, and with a proper conception of their duty in the matter, would be liable to award. *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 80 N. W. 644. It is our best judgment that the defendant ought not to be compelled under that rule to submit to the payment of more than $2,500. That seems small, compared with the verdict of the jury, but, unlike most cases where this court has been called upon to exercise its power to give parties an opportunity to end their litigation without a new trial, the verdict furnishes here no sort of assistance. A jury might reasonably assess plaintiff's damages as low as $2,500. They might, of course, assess the same somewhat higher. The range of human judgment in respect to such matters is quite large. It is a very difficult matter to set boundaries beyond which it cannot go. It cannot be done at all with any very great degree of certainty. The

best that can be done is to apply unbiased judgment and experience to the evidence. We have done that with the result suggested. If plaintiff does not see fit to accept the amount named, the way is open for him to appeal to another jury.

There is nothing further that need be said in this case. It is with much regret that we have been compelled to treat it as we have. We entertain a high regard for the learned, painstaking and conscientious judge who tried the case, and for the distinguished counsel who conducted the case for respondent. For the former, we can say it is but natural to lean somewhat for support in the course of a hotly contested trial, without time for reflection, upon eminent counsel, whose standing at the bar and whose large experience is an assurance against his consciously, or at all, proceeding to effect outside the legitimate boundaries of the case, especially in moving the judicial mind to the commission of error. But after all lawyers are not judges. Their sphere of action is different. However distinguished they may be, the only really safe way in any case is for the independent judgment of the judicial head of the court to dominate the trials. Counsel are liable to use all power they are masters of, if permitted, for the attainment of valuable results for their clients. The court must necessarily at all times himself control the scales of justice, keeping out those illegitimate makeweights that have no business therein, but which able counsel are liable, if not restrained, to throw into the balance upon their side of the case. The court can do that and still give counsel ample range for all their learning, ability and experience within the limits of the case, while repressing, and if necessary suppressing, excursions outside thereof.

By the Court.—The judgment of the circuit court is reversed. The cause is remanded for a new trial unless the plaintiff elects, by notice in writing served upon the attorney for the defendant within twenty days after the filing of the *remittitur* in the office of the clerk of the trial court, to take

judgment for the sum of $2,500, with costs in such court subsequent to such filing. If such election be made, judgment may be rendered accordingly upon application therefor to such court.

DECKER, Administrator, Respondent, vs. MCSORLEY, Appellant.

February 3—February 24, 1903.

Animals: Permitting to run at large: Knowledge of owner: Ordinances: Violation.

An ordinance provided that "no horse shall be permitted to run at large in the city," and that any person "who shall permit the same" to run at large shall be punished. *Held*, that negligence in not securing the horse from escape does not constitute violation of such ordinance, but it must appear that the horse was at large with the knowledge and assent or permission of the owner.

APPEAL from a judgment of the circuit court for La Crosse county: J. J. FRUIT, Circuit Judge. *Reversed.*

This is an action to recover damages for the alleged death of the little son of the plaintiff, four and one half years of age, who was killed by the kick of the defendant's vicious horse while running at large in the public highway contrary to an ordinance of the city. Issue being joined and trial had, a verdict was rendered in favor of the plaintiff for $1,000, and a judgment entered thereon was reversed by this court, and the cause was remanded for a new trial. *Decker v. McSorley,* 111 Wis. 91–102, 86 N. W. 554. At the close of such new trial the jury returned a special verdict to the effect (1) that the defendant's horse was running at large in the streets of the city of La Crosse, contrary to the ordinance in evidence, at the time of the alleged injury to Blair Decker;

(2) that the parents of the deceased child were not, either of them, guilty of any want of ordinary care which in any way contributed to the injury; (3) that the plaintiff's deceased son was kicked by the defendant's horse September 23, 1899; (4) that the defendant's horse had no propensity to kick or bite; (6) that such wrongful act of allowing the horse to run at large was the proximate cause of the death of Blair Decker; (7) that they assessed the plaintiff's damages at $560. From the judgment entered thereon in favor of the plaintiff for the amount last stated the defendant brings this appeal.

For the appellant there was a brief by *Higbee & Bunge, Thomas Morris,* and *Paul W. Mahoney,* and oral argument by *E. C. Higbee.*

For the respondent there was a brief by *Bleekman & Bloomingdale,* and oral argument by *F. H. Bloomingdale.*

CASSODAY, C. J. Most of the questions going to the merits of the controversy were determined on the former appeal. 111 Wis. 91, 86 N. W. 554. The ordinance is given in the opinion in that case, and declares that "no horse . . . shall be *permitted* to run at large in the city at any time, nor be herded or pastured in or upon any street of said city, nor be permitted to graze or feed in any of said streets, except," etc., and that any person "who shall permit the same" to so run at large shall be punished as therein prescribed. It was there, among other things, held that evidence that the horse "had frequently been at large in the streets was admissible as tending to show that it was at large with the *knowledge* and assent or *permission* of the defendant." In speaking of that question, it was said in the opinion of the court by Mr. Justice WINSLOW:

"It was competent, and in fact necessary, therefore, for the plaintiff to show in some way that the horse was at large with the knowledge and assent or permission of the owner. It was

a case where the knowledge or intent of the defendant was in question, or, perhaps, more accurately, where it was necessary to show that the act in question was not accidental; and in such cases the rule is quite well settled that similar acts, though collateral in their nature, may be shown as tending to throw light on the knowledge or intent of the party." Id.

The learned trial judge manifestly attempted to follow the former opinion in this case; but it is claimed that in charging the jury upon the first question submitted he authorized them to find that the horse was at the time running at large contrary to the ordinance, even if he was so running at large without the knowledge, assent, or permission of the defendant. The portions of the charge to which exceptions were taken are as follows:

"The mere accidental escape of the defendant's horse without her knowledge, *or its escape without her fault or negligence,* would not be a violation of the ordinance. . . . If the defendant's horse was reasonably secured in her barn, or in any other inclosure, and the defendant was *in the exercise of ordinary care and diligence* in confining such horse, or in attempting so to do, the horse would not be running at large, if by some accident, or for any other cause, for which the defendant *was not at fault or negligent,* he got out of the barn or other inclosure, and went upon the streets of said city; at least not until the defendant had reasonable time to have discovered that such horse had gotten away, and had also had a reasonable time in which to secure or retake him into her possession and keeping. . . . When an animal has escaped from its owner's premises, where it has been confined, where ordinary care or protection has been taken to secure it and keep it confined, and *there is no fault or negligence on the part of the owner,* and the owner, upon discovery of the escape of such animal, makes reasonable effort to secure and recover such animal, such animal is not running at large within the meaning of this ordinance."

The particular clauses of such portions of the charge to which objections are made are these: "Or its escape without her fault or negligence," "in the exercise of ordinary care

and diligence in confining such horse," "for which the defendant was not at fault or negligent," "or at least some fault or negligence on the part of the owner." Of course, negligence may be so reckless or gross as to be equivalent to wilful misconduct. *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333, 84 N. W. 446. But negligence, as generally understood, is the mere absence of ordinary care. No degree of mere carelessness or inadvertence constitutes gross negligence or wilful misconduct. *Watermolen v. Fox River E. R. & P. Co.* 110 Wis. 153, 85 N. W. 663; *McClellan v. Chippewa Valley E. R. Co.* 110 Wis. 326, 85 N. W. 1018. In *Montgomery v. Breed,* 34 Wis. 649, 652, the court had under consideration a statute which imposed penalties upon the owner of certain animals "who shall *permit* or for any reason *suffer* the same to run at large." In the opinion of the court it is said:

"The words used imply a *choice or design* on the part of the owner to allow the animal to go at large, when he might restrain and keep it in his own premises, or within a proper inclosure." Id.

As indicated, on the former appeal in this case it was said to be a "case where the knowledge or intent of the defendant was in question," and that it was necessary for the plaintiff to show "that the horse was at large with the knowledge and assent or permission of the owner." The defendant cannot properly be held liable under the ordinance for mere negligence. There may be adjudications under similar ordinances or statutes of other states holding a broader liability, but we are satisfied with the correctness of the decisions of this court above cited.

2. Counsel for the defendant contends that the damages are excessive. Of course, under the statute, the jury can only properly "give such damages . . . as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relatives of the deceased, specified" in the statute. Sec. 4256, Stats. 1898. Numerous cases have been

before this court under that statute, and the rule as to the measure of damages in such cases has been clearly defined, and there is no occasion for reiteration here. *Thompson v. Johnston Co.* 86 Wis. 576, 57 N. W. 298; *Thoresen v. La Crosse City R. Co.* 94 Wis. 129, 133, 68 N. W. 548; *Luessen v. Oshkosh E. L. & P. Co.* 109 Wis. 94, 85 N. W. 124. As there must be a new trial, and as the evidence may be different, we refrain from further observations upon the question.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

PRENTISS, Appellant, vs. STRAND and others, Respondents.

February 3—February 24, 1903.

Bills and notes: **Bona fide** ***purchasers: Fraud: Evidence: Practice: Negligence.***

1. **Where plaintiff's assignor purchased a negotiable promissory note in good faith, and for value, before maturity, plaintiff is entitled to the rights of a *bona fide* purchaser for value before maturity, although he may have had notice of defects.**
2. **The owner of a stallion proposing to sell him for $2,000 to a contemplated corporation, procured signatures to contracts binding the signers to take stock in the corporation, and, on organization, to give three notes for the purchase price. After all such agreements had been carried out it was discovered that the signers had signed another note for the full amount, printed on the same paper as the contracts. This note had been assigned to V., a *bona fide* purchaser for value, and by V. assigned to plaintiff for value, both transactions having taken place before maturity. *Held*, that evidence that the signers of the note on which action was brought had paid the other notes was admissible as part of the same negotiation, and as showing extinguishment of their liability arising therefrom.**
3. **Where the answer to a question is objected to, but no motion is made to strike it out as nonresponsive to the question, it is not error to allow the answer to stand.**
4. **In an action against several signers of a promissory note alleged to have been procured to be signed by fraud, there was**

testimony tending to show that the note in question had been torn from a book which purported to contain a contract to take stock in a corporation organized to purchase a horse, that the book was so bound that the part containing the note was invisible, and that the description of the book as given by all the signers was substantially identical. *Held*, that it was not error for the court, in framing questions for a special verdict, to assume that the note was in the same condition when all the defendants signed it.

5. In such case, evidence of a witness that he signed a note, contained in the same book, about the same time, and that the entire note was visible, corroborated to some extent by plaintiff's attorneys, is *held* to be insufficient to overcome a verdict that the signers were not guilty of negligence in not more closely examining the paper, and discovering that they were signing a note.

APPEAL from a judgment of the circuit court for Trempealeau county: JAMES O'NEILL, Judge. *Affirmed.*

This is an action upon a promissory note purporting to be signed by twenty-three persons, in the following terms:

"Arcadia, Wis., April 2, 1892.

"For value received, we, or either of us, promise to pay to Byron S. Fryer, or order, two thousand dollars, as follows: $600.00 April 1st, 1893, $700.00 April 1st, 1894, $700.00 April 1st, 1895, with interest at the rate of eight per cent. per annum; interest payable annually; interest, if not paid when due, to be added to the principal, and bear interest at the same rate."

The plaintiff claimed to be a *bona fide* purchaser of this note before maturity. All of the alleged signers of the note were made defendants in the action, but two of them were not found, and were never served upon; hence there were twenty-one real defendants. Of these, two, *Knut L. Strand* and *Vrol Swenson,* answered, denying the genuineness of their signatures to the instrument. The remaining nineteen defendants answered separately, each denying that he ever signed the alleged note, and further alleged that, if his apparent signature thereto be not a forgery, then that such signature was obtained by a fraudulent substitution of one

paper for another by Fryer, or by some other fraudulent device, by means of which he signed what seemed and what was represented to be a contract for the purchase of a stallion, when in fact the writing contained a note. The action was tried before a jury. On the part of the plaintiff the note in question was offered and received in evidence. It was indorsed in blank by Byron S. Fryer. One Valerius testified that he purchased it in good faith from Fryer August 12, 1892, and sold it to the plaintiff February 7, 1894. The plaintiff testified that he purchased the same from Valerius in good faith, and for value, February 7, 1894. The plaintiff also offered in evidence the testimony of experts tending to show the genuineness of the signatures of the various defendants. The note was partly printed and partly written, and occupied a few lines in small print at the top of the paper; the paper itself being oblong in shape, about seven inches long and four inches wide, with a line of perforations at the top, where it appeared to have been severed from something else. It apparently had been a leaf of a book arranged to open at the end, the printed part constituting about one-third of the space at the top, and the other two-thirds of the page being arranged with lines for signatures in double columns, there being twenty-four places for signatures, and all but one of the spaces being filled with the alleged signatures of the defendants. At the close of the plaintiff's evidence the action was dismissed as to the defendants *Vrol Swenson* and *J. O. Nilsestuen,* whose signatures were each evidenced by a mark, because there was no proof that either of them authorized his mark to be made. The action was also dismissed as to the defendant *K. L. Strand,* because it appeared that his name was signed by his son, and there was no proof of his son's authority. All of the remaining eighteen defendants testified as witnesses on their own behalf. They are and were farmers living in the vicinity of Arcadia, and all are foreigners; a number not being able to read English. All of

them finally conceded the genuineness of their signatures, except *Lena Christenson,* who absolutely denied signing. Their testimony substantially agreed as to the general nature of the circumstances under which their signatures were obtained. Their testimony tended to show that in March, 1892, Byron S. Fryer, accompanied by one Bilben, a Norwegian interpreter, came to Arcadia with a stallion, which he proposed to sell for $2,000 to a company of farmers, his plan being to form a company, who should take twenty shares of $100 each. To accomplish this purpose, Fryer and Bilben went around the country, and called on the defendants individually, to get them to subscribe to shares in the proposed company; and then in each case, when consent was finally obtained, a book was produced by Fryer, which corresponded in size with the paper on which the note in suit appears, which book was represented by Fryer as containing a contract by which the signers agreed to form a company for the purchase of the horse and to give notes for $2,000 after the company was formed. Those of the defendants who could read testified to having read the supposed contract, which was described as commencing at the top of the page and reading down continuously, the last four or five lines being upon the lower page; and said lines being that part of the note beginning "two thousand dollars, as follows." Most of the defendants testified that no such words as the first part of the note, to wit: "Arcadia, Wis., April 2, 1892. For value received, we, or either of us, promise to pay Byron S. Fryer, or order," were visible. Several of the defendants, who examined the book most closely, testified that the binding was very stiff, and was an inch or more inwidth, so that it could not be opened clear back. Nearly or quite all of the defendants who did not examine the book so closely testified in general terms that the book had the condition and appearance testified to by the witnesses who described it particularly. The defendants who could not read stated that Fryer or Bilben pre-

tended to read it to them, and induced them to believe by such reading that it was simply a contract to form a company to buy the horse, and to take shares in such company, and give notes for the horse when the company was formed, and, in all but one or two instances, that no one was present or within reach at the time who could read the English language. All of the defendants unite in declaring that the understanding was that, after the shares were subscribed, a meeting of the subscribers was to be held to close the business, and give the notes; and it appears that this meeting was in fact held April 2, 1892, and three notes in the usual form of promissory notes, one for $600 and two for $700 each, were then given, signed by the defendants; all of which have been paid in full. Neither Fryer nor Bilben was called as a witness, so that the defendants' statements as to the transactions with Fryer stand without any direct contradiction. Upon rebuttal, however, one Pelowski testified to signing a note about the same time, contained in the same book, and his testimony tends to show that when he signed the entire note was visible. This testimony is also corroborated in some degree by the testimony of one of the plaintiff's attorneys, who claims to have seen the book at several times while Fryer was obtaining signatures to the note.

The following special verdict was rendered by the jury:

"1. Is the signature of *Lena Christianson* on Exhibit A the genuine signature of such defendant? *Answer.* No. 2. Did the plaintiff purchase the note February 7, 1894, for value, and in good faith? *A.* No. 3. Did Valerius purchase the note for value, before maturity, and in good faith? Not answered. 4. Were the first three lines of the paper Exhibit A concealed by the binding in the book when it was subscribed by defendants, so that a person reading the upper and lower pages of said book, and using ordinary care, would read the same as a continuous writing and contract, and without observing said first three lines of said Exhibit A? *A.* Yes. 5. Were the signatures to the note Exhibit A of such

of the defendants as could not read the English language obtained by the fraudulent representation that the paper they were signing was a contract for the purchase of a stallion, with provisions as to forming a company, price, pedigree, number and price of shares, notes to be given, date of payments, and rate of interest, and by fraudulently omitting to read or inform the defendants of the first three lines of said Exhibit A? *A.* Yes. 6. Were the defendants induced by fraudulent representations, trick, or artifice to execute the paper Exhibit A, and under such circumstances that they were fraudulently led to believe that they were signing only a contract for the purchase of a horse, without any promissory note therein? *A.* Yes. 7. Did the defendants, when they executed Exhibit A, believe that it was a contract for the purchase of a stallion and the forming of a company therefor, and not a promissory note? *A.* Yes. Were the defendants in the exercise of ordinary care in affixing their signatures to the paper Exhibit A without discovering that it was in form a promissory note? *A.* Yes."

Upon this verdict judgment was rendered for the defendants, and the plaintiff appeals.

For the appellant there was a brief by *Richmond & Richmond* and *Higbee & Bunge,* and oral argument by *E. C. Higbee.*

For the respondents there was a brief by *Gaveney & Comstock* and *S. G. Gilman,* and oral argument by *J. C. Gaveney.*

WINSLOW, J. The evidence leaves no doubt of the grossly fraudulent character of the operations of Fryer. By means thereof he succeeded in obtaining from the defendants apparent obligations aggregating $4,000 for the purchase of property not exceeding $2,000 in value. Indeed, the fraud is not controverted in this case, and the only questions really in dispute were whether the plaintiff was entitled to protection as a *bona fide* holder of commercial paper, and, if so, whether the defendants were guilty of negligence in signing that which was in reality a negotiable note, but which they sup-

posed to be simply a contract to purchase a horse, and give their notes therefor. The first question suggested really drops out of the case upon this appeal for two reasons: (1) Because the *bona fides* of both Valerius and the plaintiff in purchasing the note in suit was thoroughly proven without substantial contradiction, and (2) because the jury failed to negative the good faith of Valerius in his purchase. If Valerius purchased in good faith, and for value, before maturity, then the plaintiff, who purchased from him, is equally protected even though he may have had notice himself of defects. *Montpelier S. B. & T. Co. v. School District,* 115 Wis. 622, 92 N. W. 439. We proceed, therefore, to consider whether the verdict of the jury to the effect that the defendants exercised ordinary care in affixing their signatures to the paper was arrived at without prejudicial error. The first and most important contention made by the appellant is that there was error in the admission of evidence. This claim is based upon the admissions of the testimony of the defendants to the effect that they had subsequently paid the three notes which they admittedly signed for the purchase of the horse. This is said to be proof of another transaction, having no legal bearing upon the controversy, and naturally exceedingly prejudicial to the plaintiff. With this claim we cannot agree. The defense of the defendants was that the various transactions by which they were induced to sign the various papers were all integral parts of the same negotiation; that in the course of this one negotiation they agreed to form a company to buy the horse for $2,000, and to give their notes for the price; and that the various papers which they signed were intended to accomplish these agreements, and nothing more. Clearly, it was necessary for them to show all that was done at the time, and we can see no valid reason why it was not competent for them to show payment of the notes. This was, in effect, simply showing that they had fully performed and discharged the agreement in fact made. Had they not shown

that they gave and fully paid the note, the case would have stood simply upon the admitted fact that they bought the horse, agreed to pay $2,000 therefor, that they had not paid it, and that the plaintiff was the owner of their agreement to pay in notes, with all the rights at least of an assignee of the contract. The payment and discharge of the notes, thus extinguishing all liability to any one resulting from the transaction (provided they showed themselves free from negligence), was manifestly proper, if not necessary, to make their defense complete. The facts were fully pleaded, and seem to us to be entirely relevant and proper to complete the history of the transaction, upon a distorted part of which plaintiff founds his right.

The appellant also claims error in the admission of evidence of the defendants to the effect that they laid the matter before the district attorney of the county, and that Fryer finally admitted the fraud, and sent a man to settle with the defendants. The supposed erroneous evidence came into the case in the following manner: Upon cross-examination of *L. K. Strand,* the plaintiff proved by him that he signed a receipt acknowledging payment to him by Fryer July 6, 1892, of $102.50, with the statement that it was for services in assisting in the sale of the horse. This receipt was then put in evidence by the plaintiff. Upon re-examination the defendant's counsel asked *Mr. Strand* to state the circumstances under which he signed the receipt, and he answered, against objection for incompetency, that "it was an indorsement that this man [Fryer] had beat us out of. I think it was a little over $1,000. We were down to Galesville to the district attorney, and had him attend to it, and he wrote to him if he would not come back and pay that money." This answer was objected to, and the court said that it was not an answer to the question, but no motion was made to strike it out. It is always competent to explain a mere receipt for money, so that there appears to be no serious ground of objection to the

question asked. If the answer was not responsive, the plaintiff should have moved to strike it out. Probably the court would have done so had the motion been made. In the absence of such a motion, no error appears.

It is claimed that there was error resulting from the fact that question 4 and the following questions of the special verdict to the jury assume that the supposed note was in the same condition when all the defendants signed it, whereas in fact they all signed at different times and places, and they do not all testify that part of it was concealed in the binding of the book. In this connection it is said that the defendant *Martin Waldera,* who could not read, did not have the contract read to him by Fryer, nor even ask that it be read. The objection does not seem substantial. All of the defendants who can read English testify, in substance, that they took the book, and read the supposed contract, or looked over while Fryer was reading it; and they all testify to the condition of the book—as to the stiffness of the binding, and the fact that an inch of the leaf was thereby concealed, and that no perforation was visible. Some of them testify to this particularly, and some generally, by stating that its condition and appearance was identical with the description given by the defendant *Moen,* who testified positively and clearly to the fact. Most of the witnesses who could not read testify also to the appearance of the book being the same as described by *Moen,* and they all testify (including *Waldera*) in one form or another to the effect that there was no one present or accessible who could read English, and that Fryer read or explained its contents to them either upon request or without request, and that his explanation and reading was that it was a contract to form a company and purchase the horse, and that they believed him. As matter of fact, the form of the questions does not prevent the jury from excepting from an affirmative answer the three defendants whom appellant claims might have been found careless in signing. But, even

if the fact were otherwise, careful reading of the testimony convinces us that the proof was simply overwhelming that the book was in the same condition when all of the defendants signed, and that the attempted evidence in rebuttal is insufficient to shake this conclusion in the least, or authorize the jury to find any verdict to the contrary.

These considerations also dispose of the claim that the verdict is contrary to the evidence. On the whole case we are satisfied that justice has been done without material error.

By the Court.—Judgment affirmed.

HOGUE, Respondent, vs. THE FARMERS' MUTUAL FIRE INSURANCE COMPANY OF SPARTA, Appellant.

February 3—February 24, 1903.

Fire insurance: Forfeiture: Incumbrance of property: Land contract: Surrender by vendee: Statute of frauds.

1. Sec. 2302, Stats. 1898, provides that an interest in land cannot be surrendered otherwise than by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. *Held*, that a surrender of a land contract by the vendee to the vendor, and acceptance thereof, coupled with an intention by both parties to extinguish the vendee's equity, satisfies the statute.
2. A vendee under a land contract was insured against fire by a policy providing that all the rights of the insured under it should be forfeited if the insured incumbered the property involved, subsequent to the application for the policy, without notice thereof to the insurance company. Thereafter the fee was conveyed by the vendor, and a new contract made between the vendee and the new owner of the fee, which called for the payment of the unpaid purchase money, back taxes, and unpaid interest. Subsequently, by agreement between the vendee, the new owner of the fee, and plaintiff, the second land con-

tract was surrendered, and a new land contract was made whereby the land was contracted to be conveyed and the insurance policy assigned to the plaintiff. The court found that this was done to secure a debt owing from vendee to the plaintiff. *Held*, that the transactions amounted to an incumbrance of the property, and rendered the policy void.

APPEAL from a judgment of the circuit court for Monroe county: J. J. FRUIT, Circuit Judge. *Reversed.*

The questions at issue included this: Was the provision of the insurance contract, rendering it void if the assured, at any time after the date of the application, incumbered the property in addition to the incumbrances thereon mentioned in such application, satisfied, so as to make such provision operative? The nature of the title of the assured and the facts as to such question, by the undisputed evidence, were as follows: James Hall took out the policy of insurance. He died prior to the commencement of this action. His title was that of vendee under a land contract. The vendor was John Vanness. The amount unpaid on the contract was $800. The vendee's interest in the property was further incumbered by a mortgage of $200 when he applied for the policy. He stated in his application that the property was incumbered to the amount of $1,000. The policy was for $250 and was for the term of five years from and after March 2, 1895. It contained a provision to the effect that it would become void if the assured should incumber the property in addition to the incumbrances mentioned in the application, at any time after the date thereof, without notice to the company. Vanness conveyed the legal title to the property to Phillip McConnell. On or prior to May 24, 1899, a new contract was made between McConnell and Hall, which they intended should supersede the one between Hall and Vanness. Under such new contract Hall became the vendee of McConnell, the amount to be paid for the property being $1,300, which sum, so far as appears from the evidence, was intended to cover all out-

standing incumbrances upon Hall's interest in the land, the $800 unpaid on the old contract, the $200 mortgage indebtedness to plaintiff, and some back taxes and past-due interest. (There was some dispute as to whether it did not include other indebtedness.) Hall was an old man. Subsequent to the making of the new contract he went to live at the home of plaintiff and his wife, and, after incurring some indebtedness to them, for the purpose of securing the payment thereof, and also securing them for services in caring for him thereafter, he turned over to them his interest in the property in question, and the insurance, in this wise: The parties, together with McConnell, having met for the purposes of the transaction, it was agreed that the contract between McConnell and Hall should be surrendered and that McConnell should make a new contract to plaintiff and his wife. That agreement was carried out. The consideration mentioned in the new contract was $1,343. There was nothing in the written evidence of the transaction showing that it was otherwise than an absolute transfer of Hall's interest in the land to plaintiff and his wife. The new contract was delivered to plaintiff, and the old one to McConnell, and the insurance policy, with an assignment thereof, was delivered to McConnell. There was a dispute as to whether Hall's interest was transferred as security or absolutely. The court found on that as follows:

"Hall, for the purpose of securing said plaintiff for a debt he then owed this plaintiff, and in contemplation of further indebtedness, did cause to be assigned to this plaintiff his interest in the land upon which said dwelling house was situated, to hold until said Hall should pay or cause to be paid his said indebtedness to the said *Hogue,* the plaintiff."

In the transaction mentioned Hall did not sign any papers, but the purpose of the transaction, understood by all parties thereto, was to substitute a contract between McConnell and plaintiff and his wife for the one between McConnell and Hall. The insurance company was not notified of the trans-

action before the loss occurred. The property was destroyed by fire September 14, 1899. All the provisions of the policy as to proceedings subsequent to the loss, on the part of the assured, were complied with. Defendant denied all liability under the policy. The court decided that plaintiff was entitled to recover the full amount of the insurance. Judgment was rendered accordingly.

For the appellant there was a brief by *Masters & Graves,* and oral argument by *C. M. Masters.*

C. L. Hood, for the respondent.

MARSHALL, J. We have here an action on an insurance contract which unequivocally provided that all rights of the assured under it should be forfeited if the insured incumbered the property involved subsequent to the application for the policy without notice thereof to the insurance company; the undisputed fact, and distinct finding of the court accordingly, that the property was so incumbered; no evidence of any fact nor any finding showing a waiver of the consequent forfeiture; and yet a judgment that the policy contract was binding upon the insurer in face of its insistence upon the benefit of the stipulated forfeiture. The mere statement of the situation, it would seem, is all that need be said for an opinion upon which to base a decision reversing the judgment.

We are unable to understand from the record, or very clearly from the argument of the learned counsel for respondent, by what course of reasoning the learned court reached the conclusion complained of. It is suggested that it may be justified upon the theory that Hall's contract with Vanness was never manually surrendered, nor by any writing, and that since he did not join in the contract with plaintiff by signing the same, or by some writing, he did not incumber his interest in the property by the transaction with plaintiff within the meaning of the policy. The further suggestion is

made that the mere giving of a bond for a deed, by the owner of land, agreeing to convey the same upon payment of the purchase money, is not an incumbering of property within the meaning of the policy. We will give such attention to both of such propositions as they seem to merit.

True, the right of a vendee of land under a land contract is an interest in land (*Richardson v. Johnsen,* 41 Wis. 100), and true, also, such interest in land cannot be surrendered otherwise than by "act or operation of law or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereunto authorized by writing." Sec. 2302, Stats. 1898. But that is satisfied by a surrender of the contract to the vendor and the acceptance thereof, coupled with an intention by both parties to the transaction to extinguish the vendee's equity under the contract (*Hutchins v. Da Costa,* 88 Wis. 371–375, 60 N. W. 427), or by the doing of any other act or acts by the vendee inconsistent with the continuance of his interest in the land under his contract, accepted by the holder of the legal title with that view, coupled with acts on the latter's part upon the faith thereof, making operative the doctrine of estoppel *in pais. O'Donnell v. Brand,* 85 Wis. 101, 55 N. W. 154; *Hutchins v. Da Costa, supra; Goldsmith v. Darling,* 92 Wis. 363, 66 N. W. 397; *Lovejoy v. McCarty,* 94 Wis. 341, 68 N. W. 1003; *Slaughter v. Bernards,* 97 Wis. 184, 72 N. W. 977. Under that rule there can be no doubt that Hall's dealing with McConnell, after the latter became possessed of the legal title to the land, whereby he accepted from the latter a new contract for the one with Vanness, such new contract including the purchase money to be paid, the amount unpaid upon the old contract, the transaction being recognized by both parties thereafter as evidencing their relative rights in the land, operated as a surrender by Ball to McConnell of his interest under the Vanness contract, by operation of law. The same rule ap-

plies to the transaction in which the contract was made between McConnell and plaintiff and his wife. The surrender by Hall of his contract with McConnell to the latter, his acceptance thereof and reliance thereon in making the new contract with plaintiff and his wife at Hall's request for the purpose of placing the latter's interest under the control of the new vendees as security, by operation of law extinguished the old contract and the vendee's interest it stood for, so far as necessary, to effectuate the intention of the parties to the transaction.

The idea advanced that the giving of a bond for a deed by the owner of land to another is not an incumbering of land within the meaning of the clause of an insurance contract such as the one we have under consideration in this case, does not appear to be material, even if good law. Here the assured did not merely give a bond to convey his interest to plaintiff. He in fact, as the court found, joined in a transaction for the purpose of conveying, and which effectually conveyed, all his right, title and interest in the property covered by the insurance policy to the plaintiff and his wife as security. It hardly admits of serious discussion that such transaction incumbered the property in addition to the incumbrances thereon specified in the application for the insurance. As we read the finding of the trial court, it is to that effect, and clearly should have been followed by a conclusion of law that the defendant was entitled to judgment dismissing the complaint with costs.

By the Court.—The judgment of the circuit court is reversed and the cause remanded with directions to dismiss the complaint with costs.

JACOBSON, Appellant, vs. TALLARD, Respondent.

February 3—February 24, 1903.

Express contract: Breach: Pleadings: Amendment: Abuse of discretion.

1. A contract provided that defendant was to take plaintiff's crop of tobacco, excluding what was damaged, paying therefor a specific price, delivery to be made at Viroqua. The crop, when tendered, was objected to by defendant as being of inferior quality, whereupon a settlement was reached whereby the whole was to be sent to defendant's warehouse at Edgerton, the damaged portion there to be separated from the whole, and its amount determined. No agreement was made as to the disposition of the damaged portion. *Held*, in an action on express contract, that there could be no recovery for damaged tobacco.
2. Where a demand, not embraced in the action, might require defendant to bring his evidence from a considerable distance, and can be made the subject of an independent action, it is no abuse of discretion, after both parties have rested, and a motion to direct a verdict has been argued, to refuse to permit an amendment of the complaint so as to state a cause of action thereon on *quantum meruit*.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Affirmed.*

This action was to recover the alleged contract price for plaintiff's crop of tobacco, of 2,485 pounds, at the price of three cents a pound for one-quarter thereof, and eight cents for the remainder. It appeared that in November, 1900, plaintiff and defendant entered into a written contract for the sale of the crop from two and one-half acres of tobacco at eight cents per pound for wrappers and binders, and "25 per cent. at three cents per pound tied in hands"; "all damaged tobacco to be excluded, and to be delivered in good packing condition at Viroqua." On January 12th the tobacco was tendered to defendant at Viroqua, and was objected to as being of such inferior quality as not to satisfy the contract.

After some negotiation, however, the crop, consisting of about 1,900 pounds of what the defendant calls "tobacco," and some 500 pounds which plaintiff had packed separately as damaged, which defendant refused to treat otherwise than "trash," was put on board the cars for defendant, under a written agreement, signed by both parties, in the following words:

"$123.90. Viroqua, Wis., Jan. 12, 1901.

"Received from *C. F. Tallard, Jr.,* one hundred and twenty-three and ninety one hundreds dollars, in full for my 1900 crop of tobacco, consisting of:

1377 lbs. wrappers and binders @ 8c. per lb.	$110 16
458 lbs. fillers @ 3c. per lb.	13 74
Total	$123 90
Less advance	10 00
	$113 90
	61 95
Balance	$ 51 95

"On account of unmerchantable tobacco delivered with the merchantable tobacco in my 1900 crop, I hereby agree that *C. F. Talard, Jr.,* may retain the sum of $61.95 as liquidated damages from the purchase price of said crop until the said crop is assorted and the unmerchantable tobacco determined.

"Received payment,

"CHARLEY JACOBSON,
"C. F. TALLARD, JR."

No communication was thereafter made by either party to the other until plaintiff commenced this suit. It appeared by defendant's undisputed testimony that, upon assorting, an amount exceeding one-half, viz., sixty or seventy per cent., of the 1,900 pounds of tobacco, was found damaged and unmerchantable for cigar purposes, so that the $61.95 paid to the plaintiff was more than he was entitled to under the agree-

ment of January 12th. There was no evidence as to the value of the rejected tobacco, except that defendant was quoted as having said that such tobacco might sell from a half a cent to a cent a pound, but was not available to him in his business. Defendant denied having used it, but testimony was offered of his admissions that he had used the whole in some way. The trial court directed a verdict for the defendant, upon which judgment was entered, from which the plaintiff appeals.

C. H. Minshall, for the appellant.

C. W. Graves, for the respondent.

DODGE, J. This action was founded upon the express contract between the parties, which was to the effect that defendant should purchase at a specified price the undamaged portion of plaintiff's crop. This contract was never modified, except by waiving the condition that before delivery the damaged portion which was not purchased should be separated from the undamaged, and that in lieu thereof the whole might be transmitted to defendant's warehouse in Edgerton, and the undamaged tobacco there separated, and the amount ascertained. In this modification there was no agreement on the part of the defendant to take or pay for any other tobacco than that originally contracted for. The parties made no stipulation whatever with reference to such damaged portion—whether because it was deemed of so trifling value as not likely to compensate the plaintiff for taking the whole tobacco back to his farm and sorting it, or to pay added cost of transportation and attention thereafter. Upon such sorting, it appears by undisputed evidence that the amount of undamaged tobacco was less than the amount for which defendant has paid. From this results logically the conclusion reached by the trial court—that he owes plaintiff nothing upon the express contract, having paid for all that he contracted to purchase and has received thereunder. This view

of the rights of the parties is in no wise in conflict with the doctrine established by many cases in this court—that one to whom is tendered, under an executory contract, property which does not comply therewith, must notify the deliverer that he does not receive it as satisfying the contract, either at the time of the delivery, or as soon as, by the exercise of reasonable diligence, he can ascertain the defects. *Locke v. Williamson,* 40 Wis. 377, 381; *Bostwick v. Mutual Life Ins. Co., ante,* p. 392, 89 N. W. 538; 92 N. W. 246. In the present case the mass of tobacco was not delivered as satisfying the contract, but merely in order that the defendant might select therefrom the contract commodity. Neither is it a case of alleged breach of warranty. The purpose of the passing of possession was not for delivery of a warranted commodity, but of a mass including the contract article, merely for the purpose of enabling the identification and separation thereof. Of course, when the identification was completed, and it was found that there remained a quantity of damaged tobacco which defendant had never purchased, that remained the property of the plaintiff, unless, indeed, there could be spelled out of the transaction a purpose to abandon it entirely by reason of its trifling value, and the burden of expense and labor imposed upon the defendant—a question not involved in this case and which we do not decide. If it was the property of the plaintiff, and was of value, it was, of course, subject to his disposal. The defendant had made no agreement either to return it to him, to dispose of it for him, or to purchase it from him. If, thereafter, the defendant so dealt with that damaged tobacco as to become liable upon implied contract to the plaintiff, that would be a distinct and different cause of action from the one sued on here, and a cause of action in no wise suggested by the complaint.

A request was made for leave to amend so as to state a cause of action *quantum meruit* which might have supported a recovery for this damaged tobacco; but such request did not

come until the case had been tried through, both parties had rested, and defendant's motion for direction of a verdict had been argued. While it was doubtless within the power of the court to have permitted such an amendment, we cannot deem the refusal thereof an abuse of judicial discretion. It was a claim in no wise suggested in the action originally brought, and for the trial of which defendant had prepared. It involved several questions of fact, as to which, doubtless, defendant's evidence must be brought from Edgerton to Viroqua, and it was a cause of action which the plaintiff might bring notwithstanding the decision in this case, all of which were cogent reasons for declining to allow the final disposal of this action to be interrupted in order to consider that claim.

We are convinced that the trial court committed no error in directing a verdict in favor of the defendant.

By the Court.—Judgment affirmed.

CONNOR and others, Respondents, vs. SHERIDAN, Appellant.

February 3—February 24, 1903.

Ejectment: Wills: Construction: Condition subsequent.

A testator devised the residue of his estate, consisting of land, to his son (who had disappeared) on condition that if he was not heard from within ten years from the date of the will the land should go to nephews and nieces. Before the expiration of the ten years the son's wife, on the ground of desertion, obtained a divorce *a mensa et thoro*, and the judgment therein adjudged to her whatever right, title and interest the son had in the testator's lands. Afterwards, on ejectment being brought against the son's wife, judgment was rendered adjudging that under the will a present estate in fee was vested in the son, but not deciding whether such estate was a base fee by reason of the condition, or whether such condition was void because too indefinite to be enforced. After the ten years had elapsed,

the son not having been heard from, the nephews and nieces brought ejectment against the son's wife. *Held*, that the conditions annexed to the devise, with the limitation over to the plaintiffs, was binding, and, the ten years having expired, the title to the land vested in plaintiffs, as tenants in common.

APPEAL from a judgment of the circuit court for Vernon county: J. J. FRUIT, Circuit Judge. *Affirmed.*

It appears from the record, and is undisputed, that November 29, 1888, Arthur Sheridan died, leaving a last will and testament, executed November 20, 1888, which was admitted to probate January 2, 1889; wherein, after providing for the payment of his debts and funeral expenses, and making certain small bequests, were contained the following provisions:

"Fourthly. I leave, devise, and bequeath all the rest and residue and remainder of my estate, real, personal, and mixed, to my only son Thomas. Fifthly. If my son, who is now absent, will not be heard from within ten years from to-day, I will, devise, and bequeath that my property, both real and personal, be equally divided between nephews and nieces—that is, between *Jane, Kate,* daughters of my brother John Sheridan, of Newark, N. J., and *Thomas* and *James,* sons of Patrick Flynn, of Newark, N. J., and the four sons and three daughters of Dennis O'Connor and his wife, of Liberty Pole, Vernon county, Wisconsin."

These provisions are followed by a clause appointing Patrick McManamy executor of his last will and testament. This is an action of ejectment, commenced January 18, 1900, by the eleven nephews and nieces mentioned in the fifth clause of the will, against the defendant, the divorced wife of the testator's son Thomas, mentioned in the clauses of the will quoted, to recover the lands described and owned by the testator at the time of his death. It appears, and is undisputed, that at the time of making the will the testator and the defendant, his daughter-in-law, were living together; that March 20, 1889, the defendant commenced an action for a divorce against Thomas on the ground of desertion, and April

22, 1889, she obtained a divorce from Thomas *a mensa et thoro,* and the judgment therein adjudged to her whatever right, title, and interest Thomas had in the lands described. About September, 1890, Patrick McManamy, as administrator of the estate with the will annexed, brought an action of ejectment against this defendant for the lands in question, to which she answered, and in which judgment was entered in her favor April 30, 1891, and that judgment was affirmed in this court March 22, 1892. 81 Wis. 538, 543, 51 N. W. 1011. July 14, 1893, P. J. McManamy was appointed administrator with the will annexed, in place of Patrick McManamy. March 29, 1899, P. J. McManamy, as such administrator, presented his final account to the county court, and prayed for a final settlement and distribution of the estate, and that court ordered the same to be heard at a time named, and after such hearing, and on June 6, 1899, that court found that the amount properly chargeable to said administrator was $245.90; that the amount properly allowed and credited to him was $245.49, and that the residue in his hands was forty-one cents; that the testator died seised of the lands described; that the deceased left, him surviving, one son, Thomas Sheridan, who at the time of the death of the testator had left home, and had not been heard from for some months, and leaving no widow, or other children surviving him; that he left the will so admitted to probate containing the provisions quoted; that Thomas had never been heard of or from since the making of such will, and that more than ten years from that day had elapsed; and it was therein ordered and adjudged that the account so stated should be, and the same was thereby, allowed; that the residue of the personal estate be, and the same was thereby, assigned to the eleven nephews and nieces named in the will in equal shares, to each one-eleventh, and that the real estate be, and thereby was, assigned to the eleven nephews and nieces, devisees named in the will, in common, and to each one undivided eleventh

thereof. Afterwards, and on January 18, 1900, the eleven nephews and nieces so named in the will commenced this action of ejectment against the defendant as the divorced wife of Thomas. The defendant answered, alleging several of the facts mentioned, and particularly the judgment of divorce, and the judgment in her favor in the ejectment suit. A jury being waived, and trial had, the court, at the close thereof, made findings of fact to the effect stated, and as conclusions of law the court found, in effect, that, Thomas not having been heard from within ten years from the date of the will, the land mentioned vested absolutely in fee in the other devisees mentioned in the will; that the order of the county court of June 6, 1899, allowing the final account, and assigning the estate of Arthur Sheridan, is *res adjudicata* as to the persons entitled to take and who did take under the will, and that such order and judgment is conclusive against the defendant claiming any right in and to such property; that the plaintiffs herein are entitled to judgment for the possession of the lands described, and for their damages in the sum of six cents, and for their costs and disbursements in this action; and ordered judgment to be entered accordingly. From the judgment so entered the defendant brings this appeal.

H. P. Proctor and *C. W. Graves,* for the appellant.

For the respondents there was a brief by *Smith & Griffin,* and oral argument by *C. J. Smith.*

CASSODAY, C. J. The provisions of the will quoted, if valid, are binding upon all parties, including the defendant. In the divorce action the court adjudged to the defendant, as the wife of Thomas, April 22, 1889, whatever estate Thomas then had in the lands described. Subsequently the administrator of the estate of Arthur Sheridan, deceased, with the will annexed, sought to recover possession of the lands so adjudged to the defendant in an action of ejectment, which, however, was decided in favor of the defendant April 30,

1891; and that judgment was affirmed by this court March 22, 1892. 81 Wis. 538, 541, 542, 51 N. W. 1011. In the opinion of the court in that case, written by my Brother WINSLOW, it is said:

"We construe the fourth and fifth paragraphs of the will in question as vesting a present estate in fee in Thomas Sheridan. Whether that estate be a base fee by reason of the condition attempted to be imposed by the fifth paragraph, or whether such condition be void because too indefinite to be enforced, is not material to the controversy before us, and is not decided. The condition, if valid, is a condition upon which the estate of the nephews and nieces depends for its inception, and not the estate of Thomas. Thomas thus having a present estate in the land, it was competent for the court in the divorce action to divest him of that estate, and vest it in the defendant, *Kate Sheridan*. She therefore now possesses, by virtue of the divorce decree, all the estate which Thomas had."

It was further held in that case, in effect, that, as there was enough property in the hands of such administrator to pay all debts and legacies, he was not entitled to the possession of the lands described as against the defendant, under sec. 3823, Stats. 1898. Manifestly, neither the judgment in the divorce action nor the judgment in the ejectment action gave to the defendant, or could give to the defendant, any greater right, title, or interest in the lands so awarded to her than was possessed by Thomas at the time such decree of divorce was made. The question presented is whether the estate so vested in Thomas by the terms of the will, and then, by the judgment in the divorce action, transferred to and vested in the defendant, became extinguished in November, 1898, after the expiration of the ten years mentioned in the will. The language of the will is unambiguous, and very plain. Thomas was the only child of the testator. He had no children, and nearly a year before the execution of the will he had left his wife and father, and gone to parts unknown. The testator was, mani-

festly, apprehensive that he never would be heard from again, and that, if he ever should be heard from again, it would be "within ten years from" the day the will was so executed. Accordingly he devised and bequeathed "all the rest and residue and remainder" of his estate to Thomas, *provided* that, if he should "not be heard from within ten years from" the day of executing the will, then he willed, devised, and bequeathed his "property, both real and personal," to "be equally divided between" his "nephews and nieces," therein named, and who are the plaintiffs in this action. There is no pretense that Thomas has ever been heard of or from since the execution of the will. The county court and the circuit court expressly adjudged that he had never since been heard of or from. The contingency upon which the estate of Thomas was to be divested and the property to become vested in the plaintiffs actually and literally occurred. It is not the case of a condition annexed to the devise, which has become impossible by the act of God or the law or the devisor, as in some cases cited by counsel for the defendant. *Parker v. Parker,* 123 Mass. 584; *Burnham v. Burnham,* 79 Wis. 557, 566, 48 N. W. 661. There is nothing in the condition annexed to the devise contrary to law or public policy, or good morals, or *in terrorem.* Thus, a condition annexed to a bequest for the benefit of a church, "that the black gown shall be worn in the pulpit, unless there shall be any alteration in the law rendering it illegal," was held, on appeal, in a recent English case, to be valid. *In re Robinson—Wright v. Tugwell,* 1897, vol. 1, Ch. Div. 85. This court has held that a condition annexed to a bequest to the effect that the person to whom the gift is so made shall learn some useful trade, business, or profession, and is of good moral character, is valid. *Webster v. Morris,* 66 Wis. 386, 389, 28 N. W. 353. Numerous cases are there cited in support of the validity of such condition. See, also, *Fuller v. Wilbur,* 170 Mass. 507, 49 N. E. 916, and cases

there cited. Thus, in a case cited by counsel for the plaintiffs, it is held:

"If a condition subsequent be followed by a limitation over in case the condition is not complied with, or there is a breach of it, it is termed a conditional limitation, and takes effect without any entry or claim, and no act is necessary to vest the estate in the party to whom it is limited." *Stearns v. Godfrey,* 16 Me. 158.

Such is the condition in question. The same counsel cites other cases to the same effect. *Whiting v. Whiting,* 42 Minn. 548, 44 N. W. 1030; *Brattle Square Church v. Grant,* 3 Gray, 146, 147; *Leonard v. Burr,* 18 N. Y. 96; *Lougheed v. The Dykeman's B. Ch.* 129 N. Y. 211, 29 N. E. 249. We must hold that the condition annexed to the devise, with the limitation over to the plaintiffs, in the case at bar, is binding; and that upon the expiration of the ten years the title to the land in question vested in the plaintiffs, as tenants in common. This renders it unnecessary to consider the question of *res adjudicata.*

By the Court.—The judgment of the circuit court is affirmed.

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Abatement and survival.

1. Sec. 4253, Stats. 1898, provides that, in addition to actions which survive at common law, actions for recovery of personal property, for the unlawful withholding or conversion thereof, and equitable actions to set aside conveyance of real estate, and to compel a reconveyance, shall also survive. Action was brought by an administrator, based on allegations that defendant, who had been the confidential agent of his intestate, had induced decedent to purchase land at excessive prices, to defendant's benefit, and that he had retained to his own use moneys collected belonging to decedent. The relief prayed was that such conveyances be declared fraudulent, and for an accounting. *Held*, that the cause of action alleged survived independent of sec. 4253. *Somervail v. McDermott*, 504

2. In such action, the complaint considered and *held* to state a cause of action to recover defendant's gains upon implied contract or resulting trust, and not in tort for damages. *Ibid.*

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3. A cause of action in equity to obtain an accounting, and payment of the amount of money disclosed to be due, is none the less single because it involves numerous items of property for which defendant is sought to be charged, and items of money or property coming into his fiduciary control in different ways. *Somervail v. McDermott*, 504

4. A complaint seeking rescission of certain conveyances of land, and return of the ostensible title to defendant, but seeking it only as a necessary adjunct to the main purpose of compelling him to account for what he wrongfully detains, presents a single cause of action. *Ibid.*

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Return on appeal: Identification of papers: Motion to dismiss.

1. On a motion to dismiss an appeal it appeared that the appeal was from a judgment; that the notice of appeal was in the usual form and perfect in every respect; that the return contained the judgment roll, properly certified, and that the judgment, by appropriate recitals, referred to the papers and proceedings on which it was based, which were all transmitted. *Held*, that a motion to dismiss for insufficiency of the notice of appeal and return should be denied. *Garvin v. Crowley*, 496

Review: Questions considered. See JUDGMENTS, 2.

2. On appeal to the circuit court from an order of the county court denying application for construction of a will, the order of the circuit court, affirming that of the county court, recited that it was based not only upon the files and proceedings, but upon proofs submitted in the matter. There was no bill of excep-

tions. *Held*, that the order of the county court was not presented for review by the appeal to the supreme court from the order of the circuit court. *Eckhart's Estate*, 52

3. A question cannot be considered on appeal in the absence of any findings, request for findings thereon, or exception that raises such question. *Wallber v. Wilmanns*, 246

4. Error alleged in respect to instructions to the jury cannot be considered where no exception thereto is reserved. *Meyer v. Milwaukee E. R. & L. Co.* 336

Same: Findings when disturbed. See CONTRACTS, 3.

5. Where it appears from the form of the order granting a new trial that alleged errors were not passed upon by the trial court, the supreme court will not pass upon them on appeal. *Giese v. Milwaukee E. R. & L. Co.* 66

6. Where the question at issue is solely one of fact, the findings of the trial court thereon will not be reversed unless clearly against the preponderance of the evidence. *Bjorkquist v. Schomberg*, 77

7. Where a written contract is ambiguous so as to justify resort to parol evidence to aid in its construction, and such evidence is in fair conflict, reversal on appeal is not justified in the absence of clear preponderance against the finding of the trial court thereon. *Merrill v. Best*, 121

8. Improper remarks by counsel cannot be the basis of reversal where the record fails to show that such remarks were objected to, or opportunity given counsel to withdraw them, or the court to rule thereon, or that any exception is reserved. *Meyer v. Milwaukee E. R. & L. Co.* 336

9. Remarks of counsel bearing on the question of damages, objected to, but promptly withdrawn, and jury instructed to disregard them, reviewed and *held* to be innocuous, or their injurious effect, if any, cured by the remission of $1,500 from a $3,500 verdict. *Ibid.*

10. Where the answer to a question is objected to, but no motion is made to strike it out as nonresponsive to the question, it is not error to allow the answer to stand. *Prentiss v. Strand*, 647

Affirmance and reversal: Equally divided court.

11. One justice being disqualified to sit and the others being equally divided in opinion, the order of the trial court is affirmed without statement of the reasons for the diverse views. *Church of the Good Shepherd v. Racine Water Co.* 11

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12. Where technical error appears in the record the judgment appealed from will not be reversed unless some prejudice thereby results to the appellant. *Coxe Bros. & Co. v. Milbrath*, 102

13. Where out of three questions of a special verdict, one question and its answer fully supports the judgment appealed from, and it cannot be discovered that either the submission of the other two questions or the admission of evidence upon the issues embraced in them could have affected the answer to that question, the appellant is not prejudiced thereby. *Ibid.*

14. Error in not directing a verdict in favor of a party is cured by a general verdict in his favor. *Northern E. M. Co. v. H. M. Benjamin C. Co.* 130

15. Where the findings of the jury exculpate the defendant from any liability, any error in the instructions to the jury on the subject of damages becomes immaterial. *Gordon v. Sullivan,* 543

Res adjudicata. See RES ADJUDICATA.

Correction on appeal without new trial. See EXECUTORS AND ADMINISTRATORS, 4.

Mandate on reversal. See EXECUTORS AND ADMINISTRATORS, 4.

16. Where error is committed and no motion is made to correct the verdict in that respect and for judgment thereon as corrected, the supreme court on reversal will remand for a new trial. *Comstock v. Fraternal Accident Asso.* 382

17. If a judgment in an equity case or an action at law tried by the court be reversed on appeal to this court, and there is an unsolved question of fact that must be determined before final judgment can be rendered, and there are conflicting reasonable inferences as to how such issue should be solved, rendering it doubtful which way is the right of the matter, lest injustice may be done by the exercise of jurisdiction to decide the issue here as an original matter, the court will remand the cause to the trial court to determine such issue and then to apply the law to the case as directed. *Bostwick v. Mutual Life Ins. Co.* 392

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APPEARANCE. See JUDGMENTS, 7, 8.

APPORTIONMENT OF LOSS. See INSURANCE, 1–7.

ARBITRATION AND AWARD.

See ASSOCIATIONS.

1. The award of arbitrators, within the scope of the submission to them, is binding upon the parties concerned. The triors agreed upon are the supreme judges within such scope, not only as to the law but as to the facts, and their decision in respect thereto, however erroneous it may be, tested by abstract principles of right, cannot properly be judicially disturbed. *Bartlett v. L. Bartlett & Son Co.* 450

2. If arbitrators, in reaching a conclusion in respect to a matter before them for decision, go outside of the scope of the submission by disregarding the facts or the rules governing the same, either wilfully or ignorantly, through either good or bad motives, the result will be tainted with jurisdictional error and can be dealt with by the courts at the suit of the injured party if it is prejudicial to his property rights. *Ibid.*

3. If arbitrators reach a conclusion by a departure from the scope of the submission, or if, acting therein, they are guilty of misconduct so palpable as not to be reasonably attributable to error of judgment, such conclusion is fatally defective for jurisdictional error. *Ibid.*

4. The determination of a disciplinary proceeding by a regularly constituted tribunal of a voluntary association according to its rules is in effect an award of arbitrators, and so long as such proceeding is free from jurisdictional error it is not open to judicial scrutiny. However, like the determination of a *quasi-judicial* body, it is a proper subject for judicial investigation and control as regards jurisdictional error at the suit of any party aggrieved because of an injury to his property rights. *Ibid.*

5. Clerks of members of a board of trade being disabled from making contracts within its jurisdiction, binding upon their employers, a contract made in violation thereof, unless ratified by the employer of the offending clerk, is, as regards the jurisdiction of the association, absolutely void. The employer of such clerk, upon being charged before the proper tribunal of the association with having violated its laws, by refusing to be bound by the transaction, is entitled to be exonerated upon its appearing that such transaction was neither authorized nor ratified by him. A finding otherwise, reached by testing the rights and obligations of the parties concerned by a standard not found in the laws of the association, is not binding upon the person aggrieved. *Ibid.*

6. A person employed to do mere clerical duties in business transactions, who is prohibited from making contracts for his employer, cannot bind the latter by assuming to have such authority and contracting in the name of his employer with a person having knowledge of the scope of his employment, and then passing the void transaction as legitimate in the course of his duties of checking up his employer's trades to avoid mistakes and giving the customary memoranda evidencing such as may be found upon such verification to be correct. That principle is so well understood that a decision otherwise by arbitrators cannot be attributed to mere error of judgment. *Ibid.*

ARREST. See JUSTICES' COURTS, 4.

ASSAULT AND BATTERY.

1. In an action for assault and battery the plaintiff made no pretense in her testimony of an assault on more than one occasion, and fixed that occasion with absolute positiveness on a certain day. The defense, besides direct contradiction of any assault, consisted of evidence tending to prove an *alibi* on the day specified. *Held*, that it was not error to give to the jury an instruction, in substance, that it was not essential that the evidence show that the acts complained of were committed on the day alleged; that if the evidence satisfied the jury that the act was committed at or about that day, and it was the very act described in the complaint, then it did not defeat the action if the date alleged in the complaint was not the precise day on which the specified act was committed. *Taylor v. Young*, 61 Wis. 314, 21 N. W. 408, followed. *Bruske v. Neugent*, 488

2. In such case, the court gave an instruction, in substance, that, if the jury believed the defendant's testimony that he committed no assault, they must render a verdict in his favor. The jury were also instructed to consider and weigh the evidence and credibility of each witness who had testified in the case. *Held*, that the instruction was not so framed as to lead the jury to think they were merely to compare the plaintiff's testimony with defendant's testimony, and to exclude from their consideration all other testimony. *Ibid.*

3. In an action for assault and battery, in attempting undue familiarity with plaintiff and subjecting her to immoral solicitation, a verdict of $500 is not excessive although the physical and pecuniary injury may be insignificant. *Ibid.*

ASSENT. See CONTRACTS, 17.

ASSESSORS. See MUNICIPAL CORPORATIONS, 2.

ASSIGNMENT of insurance policy. See INSURANCE, 9–12.

ASSOCIATIONS.

See ARBITRATION, 4–6. BUILDING AND LOAN ASSOCIATIONS. INSURANCE, 12–21.

1. In matters of discipline and policy, not manifestly violating private rights, voluntary associations are supreme and independent of judicial control, but when they proceed so arbitrarily as to manifestly violate the private rights of their members, they are amenable to the law the same as any other person, natural or artificial. *Wuerfler v. Trustees Grand Grove W. O. D.* 19

2. In a trial by a tribunal of a voluntary association, of a matter submitted to it under its rules, the laws of the association limit its jursidiction. The parties immediately interested as disputants stand committed by their relation to the association to abide by whatever result may be reached by the triors within the legitimate field in which they are entitled to go and no further. That includes power to construe the rules of the association as to their jurisdiction and those claimed to have been violated by the member whose conduct is under investigation when such rules will reasonably admit of two constructions, but not otherwise. *Bartlett v. L. Bartlett & Son Co.* 450

ASSUMPTION OF RISK. See MASTER AND SERVANT, 1–3. RAILROADS, 9.

ATTACHMENT.

See SUMMONS, 2–4.

1. The only conditions of the issuance of a writ of attachment in an action commenced in the circuit court are that, concurrently therewith, a summons be issued, unless that shall have theretofore occurred; that the action shall not have proceeded to final judgment, and that it shall be one in which such a writ is proper. Whether there is a cause of action in fact against the defendant, or the statutory conditions requisite to the execution of the writ be satisfied, or the facts in that regard exist, are immaterial on a motion to dismiss the writ as improvidently granted. *Gallun v. Weil,* 236

2. A writ of attachment can only be properly executed upon there being attached thereto an affidavit, made by the plaintiff or some one in his behalf, satisfying the calls of sec. 2731, Stats. 1898. *Ibid.*

3. If property be seized under a writ of attachment without sec. 2731, Stats, 1898, being complied with, the seizure may be discharged on motion, but the writ cannot be set aside on that ground as improvidently granted. *Ibid.*

4. If the facts alleged in an affidavit for the execution of a writ of attachment, as to the liability of the defendant, do not exist, the provisional remedy must nevertheless abide the result of the suit, since no question in that regard can be raised in the proceeding to enforce the provisional remedy. *Ibid.*

5. Independently of the liability of the defendant, the grounds of the issuance of a writ of attachment can only be questioned by a traverse of the affidavit for the execution of the writ and trial of the issues thus formed according to sec. 2745, Stats. 1898. *Ibid.*

6. A writ of attachment issues generally against the property of the defendant not exempt from execution and may be executed by seizing any of such property wherever found within the county of the officer having the writ, even though the property be in the possession of the plaintiff. *Ibid.*

7. After property has been seized by an officer under a writ of attachment, he may leave the same with the plaintiff as his bailee to care for the same temporarily, without jeopardizing the lien of the attachment. The remark in *Mahon v. Kennedy*, 87 Wis. 50, 57, N. W. 1108, inconsistent therewith, withdrawn. *Ibid.*

ATTACHMENT FOR CONTEMPT. See JUSTICES' COURTS, 3, 4.

ATTORNEY AND CLIENT.

1. A defendant in an action on a promissory note contracted with his attorney that the latter should receive, as fees for defending the action, the costs taxable in favor of the defendant, if successful. Thereafter plaintiff's attorney, with knowledge of such arrangement, prepared a written stipulation for discontinuance of the action as to such defendant without costs, and, in the absence of defendant's attorney, procured defendant to sign it. Afterwards defendant moved to set aside the order entered thereon discontinuing the action as to him, alleging that he did not understand the effect of the paper, and that he was prevented from so doing by the wrongful conduct of plaintiff's attorney. It appeared that defendant was a man of ordinary common sense, could read and understand plain English words, and had ample opportunity to read the stipulation before he signed it. *Held*, that it was error to hold that the stipulation was obtained by fraud, and to set aside the judgment based thereon. *Garvin v. Crowley*, 496

2. Where an attorney agreed to defend an action, and receive therefor the costs taxable to his client, if successful, such agreement does not give the attorney a lien, either legal or equitable in character, upon the mere right of his client to defend against plaintiff's cause of action, precluding the defendant from settling the litigation independently of his attorney. *Ibid.*

ATTORNEY'S ARGUMENTS TO JURY. See APPEAL, 8, 9. RAILROADS, 3, 4.
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BEQUESTS BY IMPLICATION. See WILLS, 6.

BILLS AND NOTES.

See ATTORNEY AND CLIENT, 1. HUSBAND AND WIFE. JUDGMENTS, 8.

1. A note reciting that "the Gymnastic Association of the North Side of Milwaukee" and "we the undersigned promise to pay," and signed with the corporate name "by P." and others, who were its officers, but without official designation, binds the corporation, and the officers as individuals. *Nunnemacher v. Poss*, 444
2. An ordinary promissory note, signed by defendants individually as makers, contained an option of payment in lumber at going rates. The note was a plain, unambiguous, and complete document, and, when construed with the accompanying agreement, left nothing for explanation. In an action thereon the answer alleged, among other facts, that prior to the giving of such note the defendants, to the knowledge of the plaintiff, had agreed to form a corporation, and gave the note in suit with the understanding that they were signing a note for the proposed corporation, and that plaintiff received it with that understanding; that the corporation was afterwards formed, and, before the maturity of the note, it offered to pay the note in lumber, but plaintiff declined to receive the same. There was no mutual mistake alleged, nor any attempt to state any claim for equitable relief, nor was there any counterclaim for reformation. *Held*, that the answer in that respect stated no defense, and parol evidence was inadmissible for any purpose thereunder. *Bohn Mfg. Co. v. Reif*, 471
3. Such answer further alleged that the note was alway considered a liability of the corporation by both plaintiff and defendants; that plaintiff made a written agreement with the corporation to take certain lumber in payment of the note, which the corporation was willing to deliver, but which plaintiff neglected to take; that afterwards the corporation made a voluntary assignment for the benefit of creditors, and that plaintiff filed therein a duly verified claim for the amount due upon the note, treating the corporation as the maker thereof, and received a dividend thereon. It was not alleged that the agreement of the corporation to pay was based upon any consideration, nor was it alleged that the plaintiff ever assented to any discharge of the defendants from liability thereunder. *Held*, that the facts stated were insufficient to show a release of defendants by novation, and in that respect the answer failed to state a defense. *Ibid.*
4. The executive officers of a payee of a note, signed by defendants as individuals, testified positively that they never had any knowledge of an alleged agreement whereby a corporation, formed by defendants, assumed and agreed to pay the note; that they never consented to make, and were never asked to make, a substitution of debtors. *Held*, that the fact that the

payee had considerable correspondence with such corporation, and agreed to accept lumber from it in discharge of the note, and subsequently proved the note as a claim against the corporation, it having made an assignment for benefit of creditors, was not in itself sufficient to show knowledge by the payee of an assumption of the debt of the corporation. *Ibid.*

5. Where plaintiff's assignor purchased a negotiable promissory note in good faith, and for value, before maturity, plaintiff is entitled to the rights of a *bona fide* purchaser for value before maturity, although he may have had notice of defects. *Prentiss v. Strand,* 647

6. The owner of a stallion proposing to sell him for $2,000 to a contemplated corporation, procured signatures to contracts binding the signers to take stock in the corporation, and, on organization, to give three notes for the purchase price. After all such agreements had been carried out it was discovered that the signers had signed another note for the full amount, printed on the same paper as the contracts. This note had been assigned to V., a *bona fide* purchaser for value, and by V. assigned to plaintiff for value, both transactions having taken place before maturity. *Held,* that evidence that the signers of the note on which action was brought had paid the other notes was admissible as part of the same negotiation, and as showing extinguishment of their liability arising therefrom. *Ibid.*

7. In an action against several signers of a promissory note alleged to have been procured to be signed by fraud, there was testimony tending to show that the note in question had been torn from a book which purported to contain a contract to take stock in a corporation organized to purchase a horse, that the book was so bound that the part containing the note was invisible, and that the description of the book as given by all the signers was substantially identical. *Held,* that it was not error for the court, in framing questions for a special verdict, to assume that the note was in the same condition when all the defendants signed it. *Ibid.*

8. In such case, evidence of a witness that he signed a note, contained in the same book, about the same time, and that the entire note was visible, corroborated to some extent by plaintiff's attorneys, is *held* to be insufficient to overcome a verdict that the signers were not guilty of negligence in not more closely examining the paper, and discovering that they were signing a note. *Ibid.*

BICYCLE RIDING. See INSURANCE, 27.

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BOOKS OF ACCOUNT. See EVIDENCE, 1, 2.

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BUILDING CONTRACTS.

1. Where the contractor for the erection of a building is not himself in default, and, after he has gone to substantial expenses in its partial completion, the owner wrongfully prevents him from completing the contract, the contractor may elect, either to insist on the continued existence of the contract, that he be permitted to perform, and recover damages for its breach, or he may treat the owner's act as a declaration of rescission, assented to by him. In the latter case, where the contract itself provides for no apportionment of compensation, he may recover *quantum meruit* the reasonable value of the work done by him prior to such rescission. *Geo. M. Newhall Engineering Co. v. Daly,* 256

2. Plaintiff contracted to erect a bottling and refrigerating works for defendant. In an action thereon the evidence (stated in the opinion) is *held* to establish that, after plaintiff had gone to substantial expense in partial completion thereof, defendant wrongfully prevented plaintiff from further progress with the work, and that therefore it was not error to award plaintiff judgment for the reasonable value of the work done. *Ibid.*

BUILDING AND LOAN ASSOCIATIONS.

1. Sec. 2014—5, Stats. 1898, giving to mortgages of building and loan associations priority over liens upon the mortgaged premises, *filed* subsequent to the recording of the mortgage, is not repugnant to sec. 1, art. XIV, U. S. Const., prohibiting any state from making or enforcing any law which shall deny to any person within its jurisdiction the equal protection of the laws. *Julien v. Model B., L. & I. Asso.* 79

2. Sec. 2014—5, Stats. 1898 (ch. 368, Laws of 1897, entitled "An act regulating building and loan associations"), is not a private or local law, within sec. 18, art. IV, Const., prohibiting the legislature from enacting any private or local law containing more than one subject, which must be stated in the title. *Ibid.*

3. Ch. 368, Laws of 1897 (sec. 2014—5, Stats. 1898), entitled "An act *regulating* building and loan associations," reasonably suggests the means deemed necessary or appropriate to the efficient administration of their business and the status of their mortgage liens, as regards other liens on the property affected, within the prohibitions of said sec. 18, art. IV, Const. *Ibid.*

4. Sec. 3314, Stats. 1898, making mechanics' liens date from the commencement of the work, was part of the revision of 1878, and re-enacted as ch. 380, Laws of 1897, which last act is of later date than ch. 368, Laws of 1897 (sec. 2014—5, Stats. 1898), giving mortgages of building and loan associations priority over other liens on the mortgaged premises filed subsequent to the recording of the mortgage. Sec. 4985, Stats. 1898, declares that the provisions of the revision of 1898, so far as they are the same in substance as those of existing laws, shall be construed as a continuation of such laws and not as new enactments. *Held*, that since ch. 380, Laws of 1897 (sec. 3314), contained no repealing clause, and was only enacted to give immediate effect to certain sections of the revision of 1898, it cannot be said to repeal ch. 368, Laws of 1897 (sec. 2014—5, Stats. 1898), although repugnant thereto and enacted later. *Ibid.*

BURDEN OF PROOF. See EQUITY, 2.
BY-LAWS. See INSURANCE, 19.
BY-STANDER. See RAILROADS, 5–8.
CARRIERS. See RAILROADS.
CERTIFICATE.
Of mutual benefit association. See INSURANCE, 14–18.
Of stock. See CORPORATIONS, 1–3.

CERTIORARI.

1. Where a county court exceeds its jurisdiction in improperly transmitting the record in a cause to the circuit court, the latter court has jurisdiction to hear and decide a motion to remand the record, and such motion being within its jurisdiction an order denying the same cannot be reviewed on *certiorari*. *State ex rel. Winchell v. Circuit Court*, 253
2. A suitor has no absolute right to the common-law writ of *certiorari*. Where the relator shows no equity, and, so far as his legal rights are concerned, has suffered no injury not remediable at law, it is proper to deny the use of the writ; and, where it further appears that the relator, as a private individual with a trifling injury, remediable by ordinary means, complains against the acts of a municipal corporation, it is an abuse of discretion to permit the use of the remedy of *certiorari*. *State ex rel. Hallauer v. Gosnell*, 606
3. A city council, having authority by ordinance to fix water rates only by acting upon the recommendation of the board of public works of the city, established such rates without previous recommendation of the board of public works. It did not appear that the rates fixed by the council were inequitable. The pecuniary injury to the consumer was trifling, as compared with the disturbance of public affairs in compelling the city to defend its jurisdiction before the courts upon a common-law writ of *certiorari*. *Held*, that it was an abuse of judicial discretion to allow the writ on the relation of a consumer. *Ibid.*

CHANGE OF VENUE.

See CERTIORARI, 1.

1. In a suit to abate a nuisance, pending in a county court having civil jurisdiction, the action was tried on equitable issues, the order therefor providing that, should judgment thereon go against defendant, the ultimate assessment of damages be made by a jury or referee. Interlocutory judgment on the equitable issues having been entered in favor of plaintiff, it was affirmed on appeal. After remission of the cause it was placed on the calendar for trial. Thereupon the defendant filed an affidavit of prejudice of the judge, and an order was entered changing the place of trial to the circuit court. *Held*, that such order, changing the place of trial, was void, being beyond the jurisdiction of the court, since it was made after the trial had commenced and while it was not yet fully completed. *State ex rel. Winchell v. Circuit Court*, 253

2. Where, on application for a change of venue, the court's action in actually transmitting the record is beyond its jurisdiction, because taken after the trial had commenced, and, on due motion therefor, the court to which the record has been physically transmitted refuses to remand the record, the only process by which the supreme court can compel the granting of an order remitting the record to the county court, is by writ of *mandamus*. *Ibid.*

3. In such case, since reversal of the action of the court to which the record has been transmitted will still leave the record in the wrong court, and the relator in the same predicament, the supreme court will not allow a litigant to invoke its superintending power, as nothing practical can be accomplished thereby. *Ibid.*

CHILD. See INSURANCE, 10–12.

CIRCUIT COURT. See CERTIORARI, 1. EXECUTORS AND ADMINISTRATORS, 4. WILLS, 1.

CITIES. See MUNICIPAL CORPORATIONS.

CLASSIFICATION.
Of cities. See MUNICIPAL CORPORATIONS, 9.
Of occupations. See INSURANCE, 27.
Of water takers. See MUNICIPAL CORPORATIONS, 12, 13.

CODICILS. See WILLS, 1, 4, 8.

CO-EMPLOYEE. See RAILROADS, 9.

CO-INSURERS. See INSURANCE, 5–7.

COLLATERAL ATTACK. See JUDGMENTS, 9.

COMMON CARRIERS. See RAILROADS.

COMMON COUNCIL. See CERTIORARI, 3. MUNICIPAL CORPORATIONS, 11–13.

COMMON SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.

COMPENSATION. See MUNICIPAL CORPORATIONS, 2.

COMPENSATORY DAMAGES. See MASTER AND SERVANT, 4. RAILROADS, 3, 4.

CONDITIONS.
Precedent. See INSURANCE, 26. MUNICIPAL CORPORATIONS, 14, 15. SALES, 7–10.
Subsequent. See WILLS, 13.

CONSIDERATION. See BILLS AND NOTES, 3. CONTRACTS, 21.

CONSPIRACY. See LIENS, 5–7.

CONSTABLE. See FALSE IMPRISONMENT, 1–3.

CONSTITUTIONAL LAW.

See BUILDING AND LOAN ASSOCIATIONS, 1–3. MUNICIPAL CORPORATIONS, 9.

1. Under sec. 18, art. IV, Const., providing that the subject of any private and local law must be stated in its title, the statement of the subject is purely a legislative function, and in that respect the legislature is unrestricted so long as language is used which, in any reasonable view, can be said to state such subject matter. *Julien v. Model B., L. & I. Asso.* 79

2. A constitutional legislative enactment cannot be rightly spoken of as contrary to public policy. *Ibid.*

3. Ch. 169, Laws of 1895, provides that in counties having a population of 150,000 or upwards the register of deeds shall receive in lieu of fees a certain salary, and that the act shall go into effect fifteen months after its passage. The act is entitled "An act to make the register of deeds' office of Milwaukee county a salaried office." *Held:*

(1) That the character of the act is to be determined by its provisions and not by its title, and that the body of said ch. 169 is general in its application.

(2) That said ch. 169 does not conflict with sec. 18, art. IV, Const., providing that no private or local bill, which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title.

(3) That the general provisions are not rendered void by reason of their being contained in the same act with other provisions of merely local application, though the title of the act refers to the latter provisions only.

(4) That the act applies to and embraces within its operation any and all counties answering the requirement when the act went into effect. *Verges v. Milwaukee Co.* 191

4. Sec. 18, IV, Const., provides that no private or local bill shall embrace more than one subject, which shall be expressed in the title. Ch. 169, Laws of 1895, entitled "An act to make the register of deeds' office of Milwaukee county a salaried office," provided, in the body, for salary in lieu of fees for the register of deeds in any county of 150,000 population or over. *Held*, that the act is not repugnant to said constitutional provision, since it is not required that the title go further than to express the subject covered by the body of the law, and, the statement of the primary purpose being in general terms, reasonably includes all the means designated to facilitate the accomplishment thereof. *Ibid.*

5. Ch. 169, Laws of 1895, provided that the register of deeds in counties containing 150,000 population or upwards should be compensated by a salary, instead of fees, as had previously been the method of compensation, and required from the register a bond conditioned for the faithful accounting for and paying over all moneys which came to his hands as such officer. There was no change in the manner of the election of the register, the clerks in the office were his appointees, as had been the case before the enactment of said ch. 169, and the bond covered the fees that had formerly belonged to the register, but which, under the act, belonged to the county. *Held*, that the act in no way attempted to change or interfere with the then existing system of county government, and did not conflict with sec. 23, art. IV, Const., providing that "the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable." *Ibid.*

6. Ch. 169, Laws of 1895, does not violate sec. 1, art. VIII, Const., providing that the rule of taxation shall be uniform, and that taxes shall be levied on such property as the legislature shall prescribe. The fees paid by the citizens for recording, whether under the fee or salary system, cannot be said to be a tax. *Ibid.*

7. Ch. 169, Laws of 1895, being a general law, does not violate subd. 6, sec. 31, art. IV, Const., which prohibits the enactment of any special or private laws for assessment or collection of taxes. *Ibid.*

CONSTRUCTIVE NOTICE. See CONTRACTS, 22. FRAUD, 8.

CONSTRUCTIVE TRUSTS. See TRUSTS AND TRUSTEES, 2.

CONTINGENT ESTATES. See WILLS, 12, 13.

CONTINUING GUARANTY. See GUARANTY, 1.

CONTRACTS.

See ACTION, 1, 2. APPEAL, 7. ARBITRATION, 5, 6. ATTORNEY AND CLIENT. BILLS AND NOTES. BUILDING CONTRACTS. CORPORATIONS, 4, 5. CUSTOM AND USAGE. DAMAGES, 1–3. EVIDENCE. EXECUTORS AND ADMINISTRATORS, 1. FRAUD. GUARANTY. INSURANCE. LANDLORD AND TENANT. LIENS, 3–5. MORTGAGES. PHYSICIANS. SALES. SCHOOLS AND SCHOOL DISTRICTS. TRIALS, 1. VENDORS.

Construction.

1. A yearly contract of employment of a traveling salesman provided for monthly salary, expenses, and a commission on all sales over $24,000, and stipulated that either party might cancel the contract on giving ten days' notice, but, at the close of the ten days' period that "the accounts to be settled on the same basis as though the full period of the contract had elapsed." *Held*, that the salesman, on the termination of the contract before the end of the year, was entitled to commission on all sales in excess of $2,000 a month. *Mayer v. Goldberg*, 96

2. In an action for damages for breach of an alleged contract of sale of binding twine, it is not error to direct a verdict for defendant where the evidence shows that neither quantity, quality or price of the twine was ever definitely agreed upon. *Losse v. Peoria Cordage Co.* 129

3. A contract provided that one party would furnish the other "what . . . paper (same as has been furnished during the last twelve months)," at agreed prices, "to be taken as ordered." After part performance the seller refused further delivery, claiming that the contract only called for an amount equal to that delivered the previous year. The buyer insisted that the true construction of that part of the contract was, that the seller should furnish it with all the paper it might need in its business during the contract year. The buyer, after notice to the seller, followed by persistent refusal to furnish more paper at the agreed price, bought what paper it needed for the unexpired time in the open market, at a higher price, and brought action for its damages. On the trial it appeared, among other things, that the character of the buyer's business had been known to the seller for a number of years; that it had been customary for the two parties to contract in advance for the buyer's entire yearly consumption of certain kinds of paper; that the buyer, after the seller had commenced performance of the contract, persistently insisted on its interpretation of the contract, and right to any damages arising from any necessary extra cost in being compelled to

buy elsewhere, and that to such position the seller offered no suggestion of denial or dissent until there had been ordered, and shipped, some 38,000 pounds more than the entire consumption of the previous year. *Held*, that the language of the contract was ambiguous, and that the evidence offered was competent and sufficient to sustain a finding that the parties, by the ambiguous expression quoted, agreed that the seller should furnish, at the prices specified, such paper as the buyer should need in its busines during the contract year. *Excelsior Wrapper Co. v. Messinger*, 549

4. In such case, the expression in the contract, "to be taken as ordered," followed by the signature of the buyer, is an undertaking on the part of the buyer to take, at the price named, the quantity specified. *Ibid.*

5. A contract was made by one having an established business, the character and magnitude of which was known to the other contracting party, whereby the latter was to furnish the former with such amount of goods as he might need in the ensuing year. *Held*, that such contract is not void for want of mutuality, since the quantity, though uncertain at the time of making the contract, is sure to become reasonably certain in the course of the year, and the buyer is bound to take, as the seller to furnish, such goods, of the quality designated, as should be needed in that business. *Ibid.*

Same: Sales: Damages.

6. In an action for damages, based on a refusal to accept goods sold under a contract for delivery at any time before a certain date at buyer's option, there was conflict as to an alleged consent to postponing the time of delivery and as to a tender of delivery on the original and postponed date. *Held*, that submitting to the jury a question whether the defendant refused to accept the goods upon an offer to deliver the same in accordance with the contract, and at a time when, by virtue of the postponements agreed upon, they still had a right to deliver, was error. Such question involves several issues, and an affirmative answer to the question does not indicate that the jury were all agreed upon the same facts. *Gehl v. Milwaukee Produce Co.* 263

7. In such case, an instruction, in effect, that it was incumbent on the plaintiff to deliver the goods in accordance with the contract at defendant's place of business, and at a time when, by virtue of the postponements agreed to, plaintiff still had a right to deliver, and that "it was immaterial when such offer to deliver was made, provided you find it was a time when, by reason of the postponements, the plaintiff had a right to deliver, and made the offer to deliver in accordance with the terms of the contract," is *held* to be misleading and confusing, if not positively erroneous; it leaves the jury to infer that delivery might be tendered at any date before the time expired. *Ibid.*

8. In such case, that part of the instruction that there must be an offer to deliver "in accordance with the contract" at defendant's place of business, is too indefinite, where it appeared that the contract required manual delivery, and there was still in the case, and before the jury, evidence of offers of delivery of warehouse receipts, the jury being given no express or implied instruction that such offers of warehouse receipts were ineffective. *Ibid.*

9. In an action for damages, based on a refusal to accept goods under a contract of sale, it was conceded that the proper method of delivery was tendering actual delivery of the property. *Held*, that it was error to refuse to instruct the jury that a tender of warehouse receipts covering such goods was not sufficient. *Ibid.*

10. Under a contract of sale of goods, delivery to be at buyer's option on or before a certain date, the time of delivery was extended after an offer to deliver. *Held*, that the buyer was not in default unless there was a new offer of delivery at the close of the extended period. *Ibid.*

11. Under such contract a delay of ten days after the date of tender of delivery, on a falling market, and until the season for the particular goods was nearly over, before attempting to make a resale, is not due diligence. *Ibid.*

12. Where, after the buyer of goods has refused to accept them, the seller afterwards received and refused a *bona fide* and responsible offer for the goods at a higher figure than that finally obtained, the resale cannot be said to have been made with due diligence. *Ibid.*

13. A contract provided that defendant was to take plaintiff's crop of tobacco, excluding what was damaged, paying therefor a specific price, delivery to be made at Viroqua. The crop, when tendered, was objected to by defendant as being of inferior quality, whereupon a settlement was reached whereby the whole was to be sent to defendant's warehouse at Edgerton, the damaged portion there to be separated from the whole, and its amount determined. No agreement was made as to the disposition of the damaged portion. *Held*, in an action on express contract, that there could be no recovery for damaged tobacco. *Jacobson v. Tallard*, 662

Options: Acceptance: Specific performance. See BILLS AND NOTES, 2. CONTRACTS, 6, 10, 11. LANDLORD AND TENANT, 4–7. MORTGAGES.

14. A mere option does not ripen into a contract and become a binding obligation upon the grantor unless accepted by the holder within the time limited therein, and according to its terms, but the rights of the parties thereunder expire on the date limited without notice, or declaration of forfeiture. *Mueller v. Nortmann*, 468

15. K., defendant's intestate, for valuable consideration, gave plaintiff written option to purchase certain lands, which provided, among other things, that, in case plaintiff elected to make the purchase, he was to pay a certain sum to M., at a designated place, within four weeks from the date of the option, and that thereupon K. would deliver a deed of the premises to plaintiff. Within the life of the option, but after the death of K., plaintiff made a tender of the required amount at the place designated. Plaintiff brought action for specific performance. *Held*, that K. could not have withdrawn the option in his life time, and that the death of K. did not revoke the right of plaintiff to make his election within the time limited, nor did it revoke the authority of the person in charge of the place designated to accept the sum tendered. *Ibid.*

16. In such case, the plaintiff, having done everything that the option required him to do, is entitled to specific performance of his contract against the decedent's heirs. *Ibid.*

In favor of third persons.

17. If a person makes a contract with another for the benefit of a third person, the latter may enforce it at law regardless of his relations with the first person or whether he had any knowledge of the transaction between such first person and such other at the time of its occurrence, and regardless of any formal assent thereto on his part prior to the commencement of the action. *Tweeddale v. Tweeddale,* 517

18. Upon the happening of such a transaction as that above mentioned, the law operates upon the acts of the immediate parties thereto, at once creating all the relations of privity between the one making the promise and the one to be benefited thereby requisite to binding contractual relations between them. *Ibid.*

19. Contractual relations being established in the manner indicated in the preceding paragraph, neither one nor both of the immediate parties to the transaction can rescind the same or in any way interrupt or prejudice the rights of such other without his consent. *Ibid.*

20. A. having conveyed land to B. and in consideration thereof taken a contract obligating B. to perform certain services for him conditioned upon B.'s retaining the title to the property during the term the services are to be performed, and further obligating himself, in case of a sale thereof, to pay A. a specified sum of money, and to pay C. and D., strangers to the transaction, certain specified sums of money also, and having taken a mortgage on the land to secure the performance of such contract, the total consideration mentioned in the same being the aggregate of all the contingent payments, and such mortgage being so drawn as to indicate the terms of such contract thought it went to A. only, and B. having sold the property, he became, immediately upon the consummation of such sale, absolutely indebted to A., C. and D. for the sums agreed to be paid as aforesaid. *Ibid.*

21. In the circumstances above named, though the amounts which B. for the consideration moving from A. promised to pay to C. and D. were in effect gifts to the latter, the consideration between the immediate parties to the transaction supported the promise as between B. and the beneficiaries C. and D., as effectually as if they were actual parties to such transaction and parted with a consideration to either A. or B. to support the promise made for their benefit, the effect thereof being to vest in them the absolute right to the benefit of the promise, regardless of anything the immediate parties to such transaction subsequently did without their consent. *Ibid.*

22. In the circumstances above mentioned, the mortgage securing the contract having been properly recorded, though the same was fully satisfied of record, in form, by A. at the request of B. at the time of his sale of the property, and his vendee having paid the full consideration agreed upon by him, and all the circumstances related having occurred before C. and D. had any knowledge of their rights under the contract and security, such rights were nevertheless not impaired by such satisfaction. The debt of B. to them became absolute by the operation of law upon the acts of A. and B. in the original transaction, and the record of the mortgage constituted constructive

notice thereof to B.'s vendee, rendering him a party to the wrongful satisfaction of the mortgage by A. *Ibid.*

23. Under the circumstances stated in the foregoing, it was competent for either C. or D., notwithstanding the satisfaction of the mortgage, to prosecute a suit for a foreclosure of the same to enforce the performance of the promise made for their benefit. *Ibid.*

CONTRIBUTION. See INSURANCE, 7.

CONTRIBUTORY NEGLIGENCE. See FRAUD. HIGHWAYS, 1. MASTER AND SERVANT, 1–3. NEGLIGENCE, 5–7. STREET RAILWAYS.

CONVERSION. See TRUSTS AND TRUSTEES, 2, 3.

CONVEYANCES. See DEEDS.

CORPORATIONS.

See BILLS AND NOTES, 1–4. LIMITATION OF ACTIONS. QUO WARRANTO.

Promoters: Fraud: Action by stockholder.

1. Sec. 1751, Stats. 1898, provides that the capital stock of a corporation, divided into shares, shall be deemed personalty, and, when certificates thereof are issued, such shares may be transferred by indorsement of the owner and delivery of the certificate. Sec. 1753, and sec. 1, ch. 193, Laws of 1899, provides that "no corporation shall issue any stock or certificate of stock" except in consideration of money, or labor, or property estimated at its true money value, actually received by it, equal to the par value thereof, and that "all stocks . . . issued" contrary to that section shall be void. Sec. 1773 contemplates that a corporation may transact business with its own members before it is at liberty to do so with others, and sec. 4436 provides for the punishment of the issuance of a false certificate of stock. *Held*, that the words "issue any stock," and "all stocks issued," in sec. 1753, refer to certificates of stock, as distinguished from the stock itself. *Clarke v. Lincoln L. Co.* 59 Wis. 655, 18 N. W. 492, criticised, and *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21, in so far as it may be regarded as holding that a person who has subscribed for stock, but not paid in the full amount required by sec. 1753, can have no protection in equity against promoters who have defrauded the corporation, overruled. *Pietsch v. Krause*, 344

2. Plaintiffs brought action against the promoters of a corporation to recover, in behalf of the corporation, the amount of the moneys which the promoters severally subscribed and pretended to pay in. The shares of stock in the corporation were of the face or par value of $100; and it was alleged in the complaint, among other things, that plaintiffs had only paid for their stock at the rate of $34 per share. *Held*, that, notwithstanding such allegations, the complaint stated a good cause of action in equity in favor of the plaintiffs for the benefit of the corporation. *Ibid.*

3. In an action by subscribers to corporate stock against the corporation and its promoters, the complaint stated three good causes of action and thereon the plaintiff prayed judgment: First, that the corporation have judgment for moneys subscribed but not actually paid in by the promoters for their

stock; second, that plaintiffs recover of the defendants damages sustained by false and fraudulent representations as to the corporation's assets, whereby plaintiffs were induced to purchase stock; and third, that the board of directors and defendants be enjoined from selling plaintiffs' stock to pay assessments thereon and that defendants be enjoined from selling their own stock. *Held*, that the complaint stated a cause of action at law for damages and another in equity to prevent enforcement of liability of plaintiffs which were improperly united. *Ibid.*

Stockholders: Advances: Implied contracts. See CORPORATIONS, 1–3.

4. Where moneys are advanced for the use of a corporation with the knowledge, and upon the request of all the stockholders and officers acting in consultation as to the policy and conduct of the corporate affairs, such request is tantamount to that of the corporation, and therefrom, in the absence of any countervailing express stipulations, results an implied contract of the corporation to repay those advances, although there was no formal notice for, or record of, a meeting of the corporation. *Burke v. Sidra Bay Co.* 137

5. In carrying on the business of a corporation owning no assets but real estate, it was mutually understood by the stockholders and directors thereof, among whom was plaintiff's assignor, that they would not presently demand repayment of advances made for its use, so long as they should all agree on continuing the attempt to carry on its business. No definite term for such forbearance was agreed upon, and subsequently the conduct of the business for which the advances were made was abandoned. *Held*, that the lending stockholder might, after a reasonable time, terminate the indefinite term of credit and render the debt absolutely due. *Ibid.*

6. In such case five years is a reasonable time, and the election is sufficiently declared by commencing action therefor. *Ibid.*

Officers: Duties as to corporation and its members. See LIMITATION OF ACTIONS, 3, 4.

7. Subd. 5, sec. 2081, Stats. 1898, provides that express trusts may be created for the beneficial interests of any person when such trust is fully expressed and clearly defined upon the face of the instrument creating it. *Held*, that the officers and directors of a corporation are not trustees of an express trust within the calls of said statute, although a trust is necessarily "fully expressed and clearly defined" in the articles of incorporation. *Boyd v. Mutual Fire Asso.* 155

8. So long as a corporation is a going concern neither it, nor its governing body, holds the corporate property in trust for its creditors. *Ibid.*

9. The officers and directors of a corporation occupy a fiduciary relation, demanding care, vigilance, and good faith, and, if they are guilty of misfeasance or malfeasance, the corporation may at once bring an action at law to enforce any such violations of duty. *Ibid.*

10. In such case, if the corporation refuses to act, its stockholders before insolvency, and its creditors after insolvency, may enforce such liability in the right of the corporation, and the fact that the creditor must sue in equity does not alter the running

of the statute of limitations, since the application of the statute of limitations in equity is determined by the cause of action stated, rather than by the nature of the relief demanded. *Ibid.*

Insolvency: Winding up.

11. In an action to wind up the affairs of an insolvent corporation, the amended complaint alleged that certain pretended creditors, who were also its stockholders and directors, for the purpose of saving themselves harmless from liability, brought a friendly action to have the corporation adjudged insolvent, for winding up its affairs, and had a receiver appointed therein; that subsequently such receiver was removed and another appointed in his place, who, with certain other creditors, reorganized the action and made the original plaintiffs and the first receiver parties defendant. The amended complaint alleged collusion between the original plaintiffs and the first receiver, and demanded judgment for both specific and general relief against all the defendants. *Held*, that the action was a creditor's suit brought in equity, under secs. 3216–3228, Stats. 1898, providing for the winding up the affairs of insolvent corporations. *Boyd v. Mutual Fire Asso.* 155

12. In an action to wind up the affairs of an insolvent mutual fire insurance association, a member thereof must be regarded in a similar position to a stockholder of an insolvent corporation, and, the association having been adjudged insolvent and a receiver appointed pursuant to secs. 3216–3228, Stats. 1898, the right to enforce any liability against such member thereupon accrues. *Ibid.*

COSTS. See ATTORNEY AND CLIENT. JUDGMENTS, 5, 6.

CO-TENANTS. See SHIPPING.

COUNTERCLAIM. See BILLS AND NOTES, 2. PLEADING, 1, 2.

COUNTERS. See LIENS, 1, 2.

COUNTIES. See CONSTITUTIONAL LAW, 3–7. REGISTER OF DEEDS.

COUNTY COURT. See CERTIORARI, 1. CHANGE OF VENUE, 1. EXECUTORS AND ADMINISTRATORS. TRUSTS AND TRUSTEES, 5.

COURT AND JURY. See EVIDENCE, 4. FALSE IMPRISONMENT, 1, 2. RAILROADS, 5.

COURTS. See APPEAL, 2, 11. ARBITRATION, 1, 2, 4. ASSOCIATIONS. CERTIORARI, 1. CHANGE OF VENUE, 1. EVIDENCE, 4. JUDGMENTS, 1. SHIPPING. TRUSTS AND TRUSTEES, 4.

COVENANTS. See HUSBAND AND WIFE, 6, 7. VENDORS.

CREDIBILITY. See ASSAULT AND BATTERY, 2.

CREDITOR'S SUIT. See CORPORATIONS, 11, 12

CRIMINAL LAW AND PRACTICE. See ASSAULT AND BATTERY. MUNICIPAL CORPORATIONS, 1.

CUSTOM AND USAGE.

1. Where the contract for the sale of seeds was silent as to where the seeds were to be weighed, it was competent to show a uniform trade custom not to accept the weight on certain scales. *Gehl v. Milwaukee Produce Co.* 263

2. If competent evidence is admitted on the question of such a trade custom, instructions to the jury as to its effect should be given. *Ibid.*

DAMAGES.

See APPEAL, 9. ASSAULT AND BATTERY, 3. BUILDING CONTRACTS. CONTRACTS, 1, 6–11. FALSE IMPRISONMENT, 6. MASTER AND SERVANT, 4–6. PHYSICIANS. RAILROADS, 3, 4. VENDORS, 2.

1. It is inaccurate to instruct the jury that the necessary damages, for refusing to accept goods under a contract of sale, are the difference between the contract price and the sum the plaintiff could have obtained by due diligence after defendant's refusal to accept. *Gehl v. Milwaukee Produce Co.* 263
2. In case of the breach by the vendee of an executory contract for the sale of goods in refusing to accept the same, the measure of the vendor's damages is the difference between the market value of the property at the time of the breach and the contract price. *Ibid.*
3. In such case the market value is the amount realized by a resale, if the vendor exercises all reasonable diligence in the resale to secure the best price obtainable. *Ibid.*
4. Plaintiff, a skilled mechanic, forty-five years of age, suffered an injury from which he was confined seven weeks, and had been unable to fully perform the labors of his trade thenceforward. There was testimony of his medical attendant, undisputed, that complete recovery was hardly possible. *Held*, that a verdict of $2,000 was not excessive. *Meyer v. Milwaukee E. R. & L. Co.* 336

DEBTOR AND CREDITOR. See INSURANCE, 9–12.

DEEDS.

See GIFTS, 1–3. HUSBAND AND WIFE, 6. VENDOR, 1–4. WILLS, 15, 16.

It appeared from the testimony that a deed, which had been recorded, had been executed after the grantor had been sued; that he had stated that he deeded the land to defeat any judgment that might be recovered; that the grantee paid no consideration for the conveyance, and had no knowledge of its execution or of the fact that it was placed on record, which was done by the grantor, until some time thereafter, and there was evidence tending to show that the deed never was in possession of the grantee. *Held*, that such facts were sufficient to rebut the *prima facie* presumption of delivery arising from the recording of the deed. *Smith v. Smith*, 570

DEFAULT. See JUDGMENTS, 1–4.

DEFINITIONS. See WORDS AND PHRASES.

DELIVERY. See CONTRACTS, 6–8, 10, 11. DEEDS.

DEMURRER. See DESCENT AND DISTRIBUTION. PLEADING, 3–8. VENDOR, 3.

DESCENT AND DISTRIBUTION.

See EXECUTORS AND ADMINISTRATORS, 13. GIFTS. WILLS, 9–11.

In an action to recover a sum of money alleged to have been due plaintiff's husband, the complaint alleged that before the action was commenced he died leaving plaintiff "his only heir." *Held*, that the only way plaintiff could have become possessed of the

cause of action was by a transfer thereof to her in the regular course of administration of her husband's estate, and no facts being alleged showing that such transfer ever occurred, a demurrer on that ground was properly sustained. *Buttles v. De Baun*, 323

DEVASTAVIT. See EXECUTORS AND ADMINISTRATORS, 10.

DILIGENCE. See CONTRACTS, 11, 12. FRAUD, 7. SUMMONS, 4.

DIRECTION OF VERDICT. See APPEAL, 14. CONTRACTS, 2. FALSE IMPRISONMENT, 1, 2.

DIRECTORS. See CORPORATIONS, 7–9, 11. LIMITATION OF ACTIONS, 3, 4.

DISABILITIES. See INSURANCE, 9–12.

DISCONTINUANCE. See JUDGMENTS, 5, 6.

DISCRETION. See APPEAL, 5. CERTIORARI, 2, 3. EQUITY, 3. EXECUTORS AND ADMINISTRATORS, 2, 3. JUDGMENTS, 1–4. NEW TRIAL. PLEADING, 9. STREET RAILWAYS, 1.

DISQUALIFICATION. See JURORS.

DOCKETS. See JUSTICES' COURTS, 1, 2.

DOCUMENTS. See EVIDENCE, 1, 2, 4.

ELECTION OF REMEDIES. See BUILDING CONTRACTS, 1. MORTGAGES.

ELECTIONS. See MUNICIPAL CORPORATIONS, 4–10.

ELEVATED RAILROADS. See RAILROADS, 1, 2.

ENCROACHMENTS. See MUNICIPAL CORPORATIONS, 3.

ENTIRE CONTRACT. See LIENS, 4.

ENTIRETY, ESTATES BY. See HUSBAND AND WIFE, 5.

EQUAL PROTECTION OF LAWS. See BUILDING AND LOAN ASSOCIATIONS, 1.

EQUALLY DIVIDED COURT. See APPEAL, 11.

EQUITABLE CONVERSION. See WILLS, 14.

EQUITY.

See ACTION, 1–4. APPEAL, 11, 17. BILLS AND NOTES, 2. CONTRACTS, 14–16. CORPORATIONS, 1–3, 10, 11. GIFTS, 3. INJUNCTIONS. LIENS, 5–7. MISTAKE. MORTGAGES. MUNICIPAL CORPORATIONS, 3. REFORMATION OF INSTRUMENTS. SCHOOLS AND SCHOOL DISTRICTS, 2. SHIPPING. SLANDER. TRUSTS AND TRUSTEES, 4. TRIALS, 7, 8. WILLS, 15–18.

1. In an action brought against the confidential agent of plaintiffs' intestate, the complaint alleged, in substance, that through many years the defendant, as a fiduciary, and in a position of special trust and confidence, acquired control of divers amounts of his principal's money, some known, some partly known, and some unknown, some from her, and some from others for her, all of which his duty required him to apply for her benefit; that he had made no accounting of his dealings with these moneys; that the facts in relation thereto were all within his knowledge, and many of them not within the knowledge of the plaintiffs, nor, indeed, of the deceased principal. The prayer was that defendant be required to account, and pay to plaintiffs such sums as the accounting disclosed remained in his hands as such fiduciary. *Held*, that the complaint presented a case for equity jurisdiction. *Somervaill v. McDermott*, 504

2. In an action in equity against a fiduciary for an accounting, based on improper dealings with property held in such capacity, the burden of disclosure rests on the fiduciary, and the plaintiff is relieved from the original necessity of specifying and proving in detail the various breaches of trust. *Allen v. Frawley*, 106 Wis. 638, distinguished. *Ibid.*

3. In equity the arrangement of parties is of little importance, and can be regulated by the court at any time, in its discretion. *Ibid.*

ESTATES. See HUSBAND AND WIFE, 5.

ESTATES OF DECEDENTS. See ACTIONS, 1. CONTRACTS, 15, 16. DESCENT AND DISTRIBUTION. EXECUTORS AND ADMINISTRATORS. GIFTS, 4. TRUSTS AND TRUSTEES, 5. WILLS.

ESTOPPEL. See BILLS AND NOTES, 4. HUSBAND AND WIFE, 4. INSURANCE, 13, 22.

EVIDENCE.

See APPEAL, 7, 10. ASSAULT AND BATTERY, 1, 2. BILLS AND NOTES, 2–4, 6–8. BUILDING CONTRACTS. CONTRACTS, 2, 3, 5, 6, 8. CUSTOM AND USAGE. DEEDS. EQUITY, 2. FALSE IMPRISONMENT, 4–6. FRAUD, 1. GIFTS. GUARANTY, 2, 3. HUSBAND AND WIFE, 2–4. INSURANCE, 24, 25. JUDGMENTS, 1–4. LANDLORD AND TENANT, 1, 2, 4, 7. LIENS, 7. MASTER AND SERVANT, 3, 5, 6. MUNICIPAL CORPORATIONS, 1, 17, 18. PHYSICIANS, 2, 4. RAILROADS, 12. REFORMATION OF INSTRUMENTS. STREET RAILWAYS. SUMMONS, 5, 6. WITNESSES.

1. Secs. 4186, 4187, Stats. 1898, make an account book, when verified in the manner there prescribed, presumptive proof of the charges therein contained, but provide that such books shall not be admitted as testimony of any item of money delivered at one time exceeding five dollars, or of money paid to third persons. In an action on contract plaintiff was allowed, against proper objections, to introduce in evidence, generally, as proof of his cause of action, an account book, not verified as the statute required in several material particulars, and containing charges for money paid at one time exceeding five dollars, and also charges of money paid to third persons. *Held*, that it was error to receive the book in evidence without any limitation whatever as to its evidentiary effect. *Brown v. Warner*, 358

2. Such error is not immaterial because defendant admitted on the trial that the plaintiff was entitled to recover the full amount demanded in his complaint, if he was entitled to recover at all, where it appears that the book may have been considered by the jury on the issue respecting the nature of the contract, and have turned the scale in plaintiff's favor. *Ibid.*

3. Where the question of whether plaintiff's claim was barred by the statute of limitations turned upon whether he was authorized by defendants to apply certain rents in his hands, belonging to them, in part payment of their indebtedness to him, it was proper to admit in evidence letters from a third party to defendants, requesting them to make certain payments to persons named, together with certain receipts to plaintiff therefor, plaintiff having testified that by authority of defendants he executed the requests contained in such letters, by collecting rents for defendants and making the payments therewith, taking therefor the receipts in his own name. *Ibid.*

4. Remarks of the court in overruling objections to the introduction of such letters and receipts, that "whether plaintiff had authority to collect the rent or not is not very material when we come right down to it," criticised, and *held* to be language tending to confuse the jury. *Ibid.*

EXCEPTIONS. See APPEAL, 3, 4, 8. TRIALS, 1.

EXCESSIVE DAMAGES. See APPEAL, 8, 9. ASSAULT AND BATTERY, 3. DAMAGES, 4. RAILROADS, 4.

EXECUTORS AND ADMINISTRATORS.

See ACTION, 1. DESCENT AND DISTRIBUTION. GIFTS, 4. TRUSTS AND TRUSTEES, 5. WILLS.

Allowance and payment of claims.

1. An action against the estate of a decedent for board was based on an express contract. The claimant and decedent were not relatives. The court instructed the jury, that "it is not absolutely necessary to the establishment of an express contract that the witnesses should be produced who were present when the contract was made. It may be inferred from circumstances established to the satisfaction of the jury as true by the evidence, if from such facts and circumstances the jury are convinced that the express contract claimed was in fact made." *Held*, that no error was thereby committed, as the rule that an express contract for board or service can only be established by direct and positive evidence, or by circumstantial evidence equivalent to direct and positive evidence, only applies where the parties are near relatives. *Tyler v. Burrington*, 39 Wis. 376, and *Wells v. Perkins*, 43 Wis. 160, distinguished. *Oates v. Erskine's Estate*, 586

Sales of land: License.

2. On May 23, 1898, the county court licensed an administrator with the will annexed to sell real estate for the payment of debts of decedent, but refused license to sell for payment of expenses of administration. On appeal the supreme court held that portion of the order refusing license was erroneous, and, in accordance with the mandate of the supreme court, the county court entered the proper order January 16, 1900. *Held*, that, until January 16, 1900, there was no order and license to sell real estate warranted by the petition and the law, and that the two years, provided by sec. 3889, Stats. 1898, within which the county court might, in its discretion, extend such license, did not commence to run until that date. *Mackin v. Hobbs*, 528

3. Under sec. 3889, Stats. 1898, the discretion vested in the county court may be exercised at any time within the two-year limit, and after the one year allowed for the sale in the first instance. *Ibid.*

4. Where a county court has refused to extend the license granted to an administrator to sell realty solely because the first year within which such sale was directed to be made had expired, and the circuit court on appeal has not attempted to exercise its discretion over that question, but the facts all appear in the record, the supreme court may properly examine those facts, and decide thereon whether the application should have been granted. *Ibid.*

5. On appeal from an order of the county court refusing to extend the license granted an administrator to sell real estate, denied solely because application therefor had been made after the year, within which the administrator had been licensed to sell, had expired, it appeared, among other things, that all debts and legacies had been paid, and that the only unpaid demands were the expenses of administration; that the administrator was appointed in 1893; that until May 13, 1901, except the time between March 2, 1898, when the petition for license was filed, and November 21, 1900, when an injunction restraining the administrator from acting under the license was dissolved, delay was chargeable to the administrator, and that after the dissolution of the injunction the administrator, with nothing to prevent, took no steps to make a sale until May 31, 1901. *Held*, that the administrator was guilty of laches, and, under the circumstances presented, the county court, instead of extending the time, should have compelled an immediate final accounting from the administrator, and entered its final order thereon, assigning the estate, subject to valid charges, to the persons entitled thereto. *Ibid.*

[6. Whether under sec. 3850, Stats. 1898, the administration of an estate is wholly terminated at the end of six years, not decided.] *Ibid.*

Accounting: Liability of surety.

7. Where, on petition of beneficiaries under a will, the county court cites the executor to appear, file his account, and show cause why a trustee should not be appointed and the funds in the executor's hands paid over to him, the distinctive purpose of the proceeding is not changed, nor does the court lose its power to entertain and consider the whole matter and appoint such a trustee, although it does not do so until after a hearing on the executor's account, to which is attached a petition for construction of the will, followed by an appeal by the executor from the order stating his account. At most, if an irregularity, it is not one of which the surety on the executor's bond can complain. *Wallber v. Wilmanns*, 246

8. Where an executor is also named as testamentary trustee under a will, his functions and duties as executor do not cease until his final account as such executor has been filed and allowed. *Ibid.*

9. Where a county court has jurisdiction to settle and allow an executor's account, such settlement and allowance are binding on the sureties on his bond. *Ibid.*

10. Under sec. 4014, Stats. 1898, it is not necessary that a *devastavit* and default be determined against the executor before the commencement of an action on the bond. *Ibid.*

11. An action against an heir or legatee of a surety on an executor's bond is not barred because no claim was filed against the estate of the surety, where it appears that the executor's account was not filed until after the surety's estate was settled. *Ibid.*

12. An executor's liability continues until his account is fully settled and the estate fully administered. *Ibid.*

13. Where no final order has been made distributing a decedent's estate, recovery of the full amount found to be due from an executor may be had against his surety, in an action at law on his bond, although the executor is a beneficiary under the will. *Ibid.*

EXECUTORY CONTRACTS. See DAMAGES, 2.

EXEMPLARY DAMAGES. See MASTER AND SERVANT, 4–6. RAILROADS, 3.

EXEMPTIONS. See GARNISHMENT, 2. INSURANCE, 9–12.

EXPERT TESTIMONY. See PHYSICIANS, 4. RAILROADS, 12.

EXPRESS CONTRACT. See CONTRACTS, 13. EXECUTORS AND ADMINISTRATORS, 1. TRIAL, 4.

EXPRESS TRUSTS. See CORPORATIONS, 7.

EXTRAS. See SALES, 6.

FALSE IMPRISONMENT.

See JUSTICES' COURTS, 4.

1. In an action for false imprisonment it appeared, among other things, that H. was the defendant in an action brought by R. before W., a justice of the peace; that after three adjournments R., without the affidavit required by sec. 3631, Stats. 1898, procured a fourth adjournment because his lawyer could not be present; that on the adjourned day H. did not appear, and a subpœna was issued to compel his appearance; that H., having refused to obey the subpœna, an attachment, regular on its face, was issued by W. and delivered to S., a constable, who arrested H. and brought him before the justice, where he was detained for some time. H. brought an action for false imprisonment against R., the justice, and the constable. *Held*, that a verdict should have been directed against R. and W., and that the only question to be submitted to the jury, so far as they were concerned, was the question as to the amount of damages. *Holz v. Rediske*, 353
2. In such case, there being no evidence tending to show that S., the constable, had any knowledge of any lack of jurisdiction of the justice, S. was protected by his writ, and judgment in his favor should have been directed. *Ibid.*
3. In an action against a constable and two others for false imprisonment, judgment was rendered against them all, jointly. The judgment was erroneous as to the constable because he acted under a writ, fair on its face, and without knowledge of any jurisdictional defects. *Held*, that the error necessitated reversal of the whole judgment. *Ibid.*
4. In an action for false imprisonment it is error to permit plaintiff, against objection, to state that he had a family, and to give the number of his children. *Ibid.*
5. In an action for false imprisonment in the arrest and detention of plaintiff by attachment for contempt in refusing to obey a void subpœna, evidence that plaintiff was found guilty of using abusive language to the officer who made the arrest, and was imprisoned therefor, is inadmissible. *Ibid.*
6. In an action for false imprisonment it is competent, on the question of damages, to show the manner of the arrest, and all that was said and done while the plaintiff was held under the warrant under which he was arrested. *Ibid.*

FALSE REPRESENTATIONS. See LANDLORD AND TENANT, 2, 3. VENDORS, 1–4.

FEDERAL CONSTITUTION. See BUILDING AND LOAN ASSOCIATIONS, 1.

FEDERAL COURTS. See SHIPPING.

FEDERAL STATUTES. See SHIPPING, 1.

FEES. See CONSTITUTIONAL LAW, 3–6. REGISTER OF DEEDS.

FELLOW SERVANT. See RAILROADS, 9.

FINDINGS. See APPEAL, 3, 6, 7. CONTRACTS, 3. TRIALS, 5–8.

FIRE INSURANCE. See INSURANCE, 1–8.

FIXTURES.

See LIENS, 1, 2.

The Wisconsin doctrine as to fixtures is: First, actual physical annexation to the realty; second, application or adaptation to the use or purpose to which the realty is devoted, and third, which is the principal consideration, the intention on the part of the person making the annexation to make a permanent accession to the freehold. *Rinzel v. Stumpf*, 287

FORECLOSURE. See CONTRACTS, 23. HUSBAND AND WIFE, 6. MORTGAGES.

FORFEITURE. See FRAUD, 11. INSURANCE, 8, 26.

FOREIGN JUDGMENTS. See JUDGMENTS, 7–9.

FRAUD.

See ACTION, 1, 2. ATTORNEY AND CLIENT, 1. BILLS AND NOTES, 6, 7. CORPORATIONS, 1–3. EQUITY, 1, 2. LIENS, 5–7. VENDOR, 3.

1. Plaintiff agreed for a policy of life insurance but received one different from that contracted for. On receiving the policy he threw it into a drawer in his desk, without examination, although a casual glance at the policy and accompanying letter would disclose that it was not the policy he expected. Several months afterwards, on discovery of the different character of the policy, plaintiff for the first time objected, and brought action to recover the premium paid. *Held*, that the fraud, if any, was waived, and the policy accepted. *Bostwick v. Mutual Life Ins. Co.* 392
2. A person who, in a business deal with another, signs a written instrument, is conclusively presumed, as to that other and all persons claiming under him through such instrument, to know the contents thereof, no fraud or deceit being used by such other or by any one for whose conduct he is responsible, reasonably calculated to and which does induce such person to become a party to such instrument without reading it. *Ibid.*
3. If a person, by the fraud of another, or of some one for whose conduct he is responsible, becomes a party to a written instrument without reading it or personally knowing the contents thereof, he is not precluded thereby from obtaining judicial redress in some form of action, for any injury which may be thereby caused to him through such instrument not being what he supposed it to be. *Ibid.*
4. The doctrine that a person is not inexcusably negligent in signing a paper in a business transaction with another, relying upon positive false statements on the part of that other or of

some one for whose conduct he is responsible, as to its import, applies only where the deceit is practiced at the time, and in the transaction, of such signing. *Ibid.*

5. If a person contracts with another for an article to be delivered or gives an order therefor, and thereafter a thing is delivered to him ostensibly in compliance with the order or fulfillment of the contract, unless, at the time thereof or within a reasonable time thereafter, he notifies such other that such article will not be accepted as satisfying the contract or order, he will be conclusively presumed to have waived all departures therein from the thing bargained for which are obvious to the senses by ordinary exercise thereof. This is subject to what follows. *Ibid.*

6. The reasonable time mentioned in the foregoing rule commences to run from the time the person receiving the article has reasonable opportunity to observe its defects, unless the opposite party, by fraud or deceit, prevents such person from examining it or induces him not to do so; but such person cannot successfully refer merely to deception practiced upon him at the time of his giving the order or entering into the contract, to excuse failure to observe obvious departures in the thing delivered from that bargained for, at or within a reasonable time after the delivery. *Ibid.*

7. Upon the reception of an article by a person under the circumstances stated in the two foregoing rules, nothing occurring then for which the opposite party is responsible, reasonably preventing him from using, or inducing him not to use, his senses so as to discover obvious departures therein from the thing bargained for, the rule applies that the law requires men, in their dealings with each other, to exercise proper diligence and apply their attention to those particulars which may be supposed to be within reach of their judgment, and not to close their eyes to means of information which are accessible to them. *Vigilantibus et non dormientibus jura subveniunt.* *Ibid.*

8. If a person, in a business transaction with another, is deceived by the latter to his injury, such person may rescind the transaction within a reasonable time after he discovers or has reasonable opportunity to discover the fraud, constructive knowledge thereof being just as effective as actual knowledge to set the time for rescission running and to mark its limits. *Ibid.*

9. If a person receives a policy of insurance ostensibly in response to an application therefor, which he signed and parted with in the belief, induced by the fraud of the agent taking the same, that it called for a policy different from that which it called for in fact, he is bound as a matter of law to examine the policy within a reasonable time after it comes to his hand, and to discover obvious departures therein from the one which he supposed he was to get, and promptly, upon discovering the same, to rescind the transaction, give the company due notice thereof, and do all on his part which justice requires to restore the former situation, or he will be held to have accepted the policy as satisfying his application, so as to be precluded from rescinding the same. *Ibid.*

10. The reasonable time, for discovering that the policy differs from the one supposed to have been applied for in the circumstances stated in the foregoing rule, commences to run immediately

upon the reception of the paper, nothing occurring then to reasonably excuse the applicant for omitting to examine his contract. In such circumstances four and one half months' delay in discovering the fraud and exercising the right of rescission is, as a matter of law, too long a time. *Ibid.*

11. If, in the situation stated in the last foregoing paragraph, the element be added of the applicant for insurance being fraudulently deterred from examining his policy by something occurring at the time of the delivery thereof to him, four and one half months' delay in discovering the fraud is not, as a matter of law, so long as to forfeit the right of rescission. *Ibid.*

12. The existence of a cause of action at law to recover the consideration parted with upon a contract, on the ground of fraud, presupposes the actual termination of the contract because of the fraud, and that requires a repudiation of such contract by the insured person *in toto*, or so far as justice may require, and an unconditional offer on his part, so far as justice may require, to restore the wrongdoer to his former situation, or a waiver of such offer by such conduct on the latter's part as to clearly indicate that a tender to him of that which he parted with in the transaction would be useless because he would not accept it. *Ibid.*

FRANCHISE. See QUO WARRANTO. RAILROADS, 1, 2.

GARNISHMENT.

1. In an action for damages for an alleged malicious garnishment of plaintiff's wages, the special verdict failed to contain a finding of malice, or of want of probable cause. *Held*, that the verdict was insufficient to sustain a judgment for plaintiff. *Leemann v. McGrath*, 49

2. A., honestly believing B. was indebted to him, in order to evade the exemption laws of Wisconsin, assigned the account to C. for the purpose of sending it to another state for collection by garnishment. Thereafter garnishment was unsuccessfully attempted. Such assignment was made before ch. 57, Laws of 1893, prohibiting such an assignment, went into effect. *Held*, that such facts were insufficient to show actionable abuse of process. *Ibid.*

GENERAL CHARTER LAW. See MUNICIPAL CORPORATIONS, 6–8.

GIFTS

1. In an action to set aside a deed of gift, the evidence (stated in the opinion) is *held* to sustain findings of mental capacity in the donor, although at the time of the gift the donor was suffering from paralysis, and died about two months later. *Citizens' L. & T. Co. v. Holmes*, 220

2. In such case the evidence is *held* to sustain findings of absence of undue influence exerted on the donor, although by direction of the donor, assented to by the donee, the donee made suspiciously large payments for services to persons who became her witnesses, and, shortly after donor's death, the donee made large payments to the donor's heirs and took releases from them. *Ibid.*

3. In an equitable action to set aside a deed of gift on the ground of want of mental capacity and undue influence, the admission of incompetent evidence in behalf of defendant is immaterial error, where findings favorable to her are supported by competent evidence. *Ibid.*

4. A decedent, absent from home at a hotel, was taken sick and sent for defendant, to whom he executed a deed of gift of practically all his estate. Before defendant arrived, decedent gave a sum of money to the hotel keeper for safe keeping. The hotel keeper deposited it in a bank in defendant's name, and it was all drawn out by her under decedent's instructions, and used to pay expenses. *Held*, that no portion of that money belonged to decedent's estate, and defendant was not liable therefor to decedent's administrator. *Ibid.*

GROSS NEGLIGENCE. See RAILROADS, 3. MASTER AND SERVANT, 5.

GUARANTY.

See SALES.

1. A contract between a salesman and his employer, guaranteed by defendants, was for "one year from date" and might "continue from year to year." The guaranty expressly covered all moneys and goods," which the employer might "from time to time advance" to the salesman, and "any and all indebtedness" which might thereafter "become due to" the employer "from him, whether by the terms of any contract or not, in excess of the amount due" the salesman. The guaranty further provided "that any extension" might be granted the salesman "at any time" without notice or affecting the guarantor's liability, and that "for such amount" the guaranty was therein declared to be "intended as a continuing guaranty until revoked by notice in writing." *Held*, that the guaranty covered and was binding for the three years through which the salesman's employment was extended. *John A. Tolman Co. v. Butt*, 597

2. Where an employer's contract with a traveling salesman required him to give bond for all sums in which he might become indebted to the employer, and such guaranty was given, in an action brought thereon, in the absence of evidence that the guarantors were induced to sign by fraud, misrepresentation, or deceit, evidence that at the time of the execution of the guaranty, and unknown to the guarantors, the salesman was already largely indebted to the employer, is irrelevant. *Ibid.*

3. In such case, an agreement in the written guaranty, that the guarantors would "accept a verified written statement of the account (of the salesman) as kept on the regular books" of the employer, is binding and conclusive on the guarantors. *Ibid.*

HAZARDS. See INSURANCE, 27.

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 14–18. NEGLIGENCE, 9.

1. In an action for personal injuries claimed to have been occasioned by a defective highway, plaintiff alleged that there was a hole in a bridge in the highway; that defendant's overseer of

highways had placed sticks therein to warn travelers, and that her horse became frightened at the sticks, causing plaintiff to be thrown from her buggy and injured. A special verdict was rendered, in effect, that the highway was not defective; that the horse was ordinarily gentle; that it was, however, frightened by the sticks, and that the driver was not guilty of any contributory negligence. *Held*, that such verdict was not inconsistent or evasive, but was consistent with a finding that the injury was the result of pure accident, without negligence. *Miller v. Casco*, 510

2. In such case, the jury having found that the highway in question was not defective, an affirmative answer to a question whether the town officers should have known of the existence of the hole, and repaired it, so as to make the road safe, before plaintiff's injury, "if it was not then repaired so as to be safe," does not render the verdict inconsistent, since the jury simply found that, upon the supposition that the highway was not safe when plaintiff was injured, then it should have been repaired. *Ibid.*

HORSES. See MUNICIPAL CORPORATIONS, 1.

HUSBAND AND WIFE.

See INSURANCE, 9–12. WITNESSES, 3.

1. Where a married woman signs her husband's note, the payee having had no communication or negotiation with the wife, and the loan being negotiated for use by the husband in his own business, a memorandum beneath the signatures on the note, signed by the wife,—"The above note is made for the benefit of my separate estate and I hereby charge it with the payment thereof"—will not sustain a judgment against the wife, unless it be shown that the transaction was necessary and convenient for the use and enjoyment of her separate estate, or the carrying on of her personal business, or in relation to her personal services. *Ritter v. Bruss*, 55

2. In such case it is error to exclude testimony tending to establish allegations of the wife's answer, to the effect that she signed the note as surety for her husband and that the transaction did not concern her separate property, earnings or personal services. *Ibid.*

3. An action at law on a promissory note cannot be maintained against a married woman where the evidence fails to show that she possessed any separate estate. *Ibid.*

4. Plaintiff loaned A. money and, after delivery of the money, took a note, signed also by A.'s wife, without having had any negotiations or communications with her as to the matter. The wife signed a memorandum at the foot of the note stating it was for her benefit and that she charged her separate estate with payment. The memorandum did not express any consideration. *Held*, that such memorandum did not estop the wife from setting up the defense that she was a mere surety. *Ibid.*

5. Sec. 1, ch. 95, R. S. 1858, as amended by sec. 2340, R. S. 1878, and sec. 3, ch. 95, R. S. 1858, as amended by sec. 2342, R. S. 1878, covers cases of estates held as tenants by the entirety by husband and wife. *Citizens' L. & T. Co. v. Witte*, 60

6. A deed conveying lands to husband and wife excepted from the covenants of warranty a mortgage which the grantees assumed and agreed to pay as part of the purchase price. *Held*, that the agreement of the husband and wife to assume and pay the mortgage was binding upon each of them, and that the wife, as well as the husband, was personally liable for any deficiency that might arise upon a sale of the premises on foreclosure. *Ibid.*

7. A married woman may acquire land by purchase from a stranger entirely on credit and bind herself for the payment of the purchase price and, as part thereof, assume and agree to pay an existing mortgage thereon. *Ibid.*

IDENTIFICATION OF PAPERS. See APPEAL, 1.

IMPEACHMENT of sheriff's return. See SUMMONS, 6.

IMPLIED CONTRACTS. See ACTION, 2. CORPORATIONS, 4, 5. EXECUTORS AND ADMINISTRATORS, 1. TRIAL, 4.

IMPLIED REPEAL. See BUILDING AND LOAN ASSOCIATIONS, 4.

INCUMBRANCES. See INSURANCE, 8.

INDEMNITY. See INSURANCE, 6, 7.

INFANTS. See MASTER AND SERVANT, 2.

INJUNCTION.

See MUNICIPAL CORPORATIONS, 3. RES ADJUDICATA. SCHOOLS AND SCHOOL DISTRICTS.

If by the complaint of the plaintiff there is a probability of a recovery by him, which will be ineffective to vindicate his rights and afford him the full measure of redress which the litigation is competent to furnish unless the defendant, pending its final conclusion, is restrained of his freedom so as to prevent his action prejudicially to the alleged rights of the plaintiff, and if without such restraint irreparable damage will accrue to the plaintiff regardless of the final result of the suit, and from such restraint no injury will accrue to the defendant which cannot be adequately guarded against by a bond, it should, as a matter of right, be granted. *Bartlett v. L. Bartlett & Son Co.* 450

INSOLVENCY. See CORPORATIONS, 10–12. LIMITATION OF ACTIONS, 2, 3.

INSTRUCTIONS TO JURY. See APPEAL, 4, 8, 9, 15. ASSAULT AND BATTERY, 1, 2. CONTRACTS, 7–9. CUSTOM AND USAGE. DAMAGES, 1. EVIDENCE, 4. EXECUTORS AND ADMINISTRATORS, 1. NEGLIGENCE, 1–4. PHYSICIANS, 1, 2, 5. PLEADING, 1. RAILROADS, 10. STREET RAILWAYS, 2. TRIAL, 1–4. WITNESSES, 1, 2.

INSURANCE.

FIRE. See CORPORATIONS, 12. LIMITATION OF ACTIONS, 1, 2.

Co-insurers: Apportionment of loss.

1. Under sec. 1941—43, Stats. 1898, the word "loss" is used, not as a limitation upon the amount of the insurance, but primarily as a limitation of the liability. *Stephenson v. Agricultural Ins. Co.* 277

2. Under the standard fire policy of Wisconsin (sec. 1941—43 to sec. 1941—62, Stats 1898), "the amount of the insurance" is the maximum amount of the risk assumed—the face of the policy. *Ibid.*

3. Under said standard fire policy the "amount of loss" is the adjusted damage by fire to the property covered by the policy. *Ibid.*

4. Under said standard fire policy the "amount of liability," as to any particular loss, is the amount of the adjusted damages properly apportionable to the policy. *Ibid.*

5. Sec. 1941—43, Stats. 1898, prescribing the formal part of the standard fire insurance policy, enacts that the formal parts thereof shall provide for insurance against loss to an amount "not exceeding —— dollars," etc., and sec. 1941—58 provides that other formal parts of such policy shall contain provisions that the insurer shall not be liable for a greater proportion of loss than the "amount insured" shall bear to the "whole insurance." A policy on a Wisconsin standard form contained a provision that, in consideration of a reduced rate of premium, the assured agreed to maintain insurance to the extent of eighty per cent. of the value of the property, and "if at the time of fire the whole amount of insurance on said property shall be less than eighty per cent., this company shall, in case of loss or damage less than said eighty per cent., be liable for only such portion thereof as the amount insured by this policy shall bear to said eighty per cent. of such actual cash value of such property." During the life of the policy, and while the insurance in force was less than eighty per cent. of the value of the property, the property was damaged by fire to an extent less than eighty per cent. of its value. *Held:*

(1) That the language of the policy indicated that the contracting parties understood the result of a failure by the assured to take out sufficient insurance to equal eighty per cent. of the cash value of the property would not be a reduction of the amount of insurance effected by the policy, but such a division of any loss apportioned to the face of the policy out of the whole insurance between the company and the assured, as would make him bear the burden that would otherwise be cast on it by his failure to take out insurance up to the limit specified.

(2) That in apportioning the loss as between the different insurers, the amount of insurance effected by the policy was its face; but as between the underwriter of that particular policy and the assured, the latter should bear, as co-insurer, any loss not regularly insured against by his failure to take out the full amount of insurance agreed upon. *Ibid.*

6. Sec. 1943*a*, Stats. 1898, prohibits the issuance of any policy containing any provision limiting the amount to be paid in case of loss below the actual cash value of the property, if within the amount of insurance for which premiums are paid, and prohibits the use of any co-insurance clause or rider except under named conditions. Several standard form policies were issued on a building. The one issued by the M. company contained a clause, in effect, that, if the property were not kept insured up to eighty per cent. of its value, the insurer would be liable for only such portion of the policy as the amount insured therein should bear to such eighty per cent. The building was not insured up to eighty per cent. when a loss occurred. In an action against companies, other than the M. company, it was *held* that sec. 1943*a* did not apply, the policies sued on containing none of the prohibited features; that the circumstance pre-

venting the assured from obtaining full indemnity was the M. company's policy, containing a limitation of liability pursuant to said sec. 1943*a*, and the assured's election thereby to carry part of the insurance himself. *Ibid.*

7. Several standard form insurance policies were issued on a building. The one issued by the M. company contained a clause, in effect, that, in consideration of a reduced premium, insured agreed to keep in force insurance up to eighty per cent. of the cash value of the property insured, and, if he failed so to do, that the insurer in such policy should, in case of loss or damage less than eighty per cent., be liable for only such portion thereof as the amount of insurance in force should bear to such eighty per cent. There was a loss of less than eighty per cent. at a time when the assured had failed to keep up insurance to eighty per cent. of its value. Action was brought against companies other than the M. company. *Held*, that the defendant companies must be held liable according to their contracts and no further; that the fact that the insured by his contract with the M. company had stipulated away his right to full indemnity and received consideration therefor, did not relieve the defendant companies, whose premium was fixed with reference to such portion of the loss as the face of their policies, respectively, bore, to the whole insurance on the property, from full contribution. *Ibid.*

Additional incumbrance: Forfeiture.

8. A vendee under a land contract was insured against fire by a policy providing that all the rights of the insured under it should be forfeited if the insured incumbered the property involved, subsequent to the application for the policy, without notice thereof to the insurance company. Thereafter the fee was conveyed by the vendor, and a new contract made between the vendee and the new owner of the fee, which called for the payment of the unpaid purchase money, back taxes, and unpaid interest. Subsequently, by agreement between the vendee, the new owner of the fee, and plaintiff, the second land contract was surrendered, and a new land contract was made whereby the land was contracted to be conveyed and the insurance policy assigned to the plaintiff. The court found that this was done to secure a debt owing from vendee to the plaintiff. *Held*, that the transactions amounted to an incumbrance of the property, and rendered the policy void. *Hogue v. Farmers' M. F. Ins. Co.* 656

LIFE. See FRAUD, 1, 9–11.

Assignment of policy: Disability of married woman: Rights of creditors.

9. By sec. 2347, Stats. 1898, insurance on the life of any person for the benefit of a married woman cannot be reached by her creditors or those of any other person. *Ellison v. Straw*, 207

10. Ch. 376, Laws of 1891, now a part of sec. 2347, Stats. 1898, as regards married women, and, contingently, their children, changes the rule that a mere beneficiary in a policy of life insurance has no interest therein during the life of the assured which he cannot take away by naming some other person as beneficiary or disposing of the policy fund by will. *Strike v. Wis. O. F. Mut. L. Ins. Co.* 95 Wis. 583, so far as to the contrary, is overruled. *Ibid.*

11. A policy of life insurance upon the life of any person payable to a married woman, with no provision therein as to a beneficiary in case she shall not survive to take, belongs to her children if she has any surviving her, with the same freedom from interference by creditors or others as in case of the first beneficiary. *Ibid.*

12. By sec. 2347, Stats. 1898, as it now stands:

(a) A married woman may, without her husband's consent, take out a policy of insurance on his life for her own benefit, or for such benefit and that of her children.

(b) A policy of insurance taken out upon any life for the benefit of a married woman, nothing being said as to who shall be the beneficiary in case she shall not survive to take at the maturity of the policy, vests a contingent right in the insurance fund in her, which is her sole and separate property, free from control or disposition by her husband or the person taking out the insurance, and beyond the reach of the creditors of any one.

(c) Such a policy vests in the children of the married woman a contingent right to the insurance, safe from disturbance by her or any other person, or by such children, prior to the maturity of the policy and the fund reaching their hands.

(d) The right in the children does not contemplate a joint enjoyment of the insurance fund by them and their mother. It is a mere right to the fund in case the mother does not survive to receive the same, there being no other disposition thereof provided for in the policy.

(e) A policy of insurance of the character mentioned, with the added element providing for a disposition of the insurance fund upon the contingency of the wife not surviving to receive the same, vests in the wife the same right in all respects as if such secondary disposition were not made.

(f) A married woman is under an absolute disability to part with her beneficiary interest by assignment. Her husband or person paying the premium is under a like disability to disturb her rights by assigning the policy or changing the beneficiary therein, or disposing of the policy by will, and creditors generally are as completely debarred from resorting to the policy for the payment of their claims.

(g) The policy and its proceeds are free from all interferences save lapses and forfeitures mentioned, militating against the proceeds thereof, upon the time arriving and circumstances occurring named as conditions precedent to the maturity of the contract in her favor, vesting in her with the right to personal possession of the fund as her separate property, leaving the same then subject to her obligations the same as any other portion of her estate. *Ibid.*

Benefit associations: Contracts: Transactions with members.

13. Transactions between a benefit society and its members are governed by the rule, that when a contract made by a corporation has been so far executed that to allow the corporation to repudiate it would work injustice to the other party thereto, who has in good faith relied thereon, the doctrine of estoppel applies and prevents repudiation, regardless of whether the corporation had a right to make it or not, unless the act of the corporation was in violation of some written law of the state, or of sound public policy. *Wuerfler v. Trustees Grand Grove W. O. D.* 19

14. A certificate issued by a benefit society to a member pursuant to the then existing constitution of the society, and on which he has in good faith relied and paid his dues, cannot be avoided by the society on the ground of *ultra vires*, because an amendment to the constitution, authorizing the issuing of such certificate and under which it was in fact issued, was not made in the particular method provided by the constitution. *Ibid.*

15. W. had been a member of a benefit society for over twenty years prior to his death in 1897. Prior to 1894 the limit of death benefits incident to membership was $500. In 1894 there was an attempted change of the constitution increasing the limit of death benefits to $1,000. Under such change the society worked and issued its certificate to W., who paid the dues required thereunder. In 1896 the society again amended its constitution entirely doing away with all existing contracts, and providing for a death benefit of an indefinite sum. W., on request to surrender his certificate, refused to do so, insisting on his rights thereunder. *Held*, that the certificate, issued to W. pursuant to the constitution as it stood after the attempted amendment in 1894, was binding on the parties at the time of the amendment in 1896. *Ibid.*

16. A certificate issued to a member of a benefit society provided that the contract stated therein was subject to all existing by-laws, rules, and regulations of the order, *and all that might be made*. *Held*, that such reserve power warranted only those variances required in matters of detail necessary or advisable in carrying out efficiently the fundamental principle or scheme of insurance, not in changing the plan itself and nullifying all contracts entered into under it. *Ibid.*

17. An amendment of the constitution of a benefit society, providing that certificates of membership on which members have paid assessments on the basis of a death benefit of $1,000 shall be canceled, and substituting a death benefit indefinite in amount, is not a reasonable variance of the contract with the member, within a reserved power, made a part of the contract of insurance, to make future changes in the rules, by-laws, and regulations of the society. *Ibid.*

18. The action of a benefit society in notifying a member, while he yet has ample time to pay his dues, that his certificate would not be recognized as in force, effectively waives further payments so long as such attitude in that regard continues. *Ibid.*

19. A by-law of a benefit society providing that, in case of any differences between a member or his heirs and his lodge concerning benefits, the member or his heir should "have the right and the duty to apply to the grand lodge" before commencing action, does not apply where the society denies that the person bringing an action had the right of membership. *Ibid.*

20. Compliance with such by-law not being made a condition of a right, but a condition of invoking judicial remedies to enforce a right, is waived by failure to plead it by answer, the complaint being so framed that no opportunity was afforded to take advantage thereof by demurrer. *Ibid.*

21. Such by-law, in effect, binding the member or heir, if at all, to submit the controversy to arbitration, compliance therewith is waived by an unqualified denial by the society of all liability. *Ibid.*

Same: Liability: Suicide.

22. The rules of a mutual benefit association provided that the local tent was the agent of its members in collecting dues and assessments, and that the supreme tent should not be liable for any negligence, or bound by any illegal action or irregularity, of such local tent. The rules further provided that, in case of suicide, the association should be liable only to the amount of assessments paid in. Four days after the death of an insured by suicide, the collector of a local tent accepted of the beneficiary the assessments due at the date of insured's death. *Held*, that if such reception of the dues was irregular, it was an error of the beneficiary's own agent, of which she could not take advantage. *Voelkel v. Supreme Tent K. M. W.* 202

23. Where a mutual benefit association was liable for some amount, whether the insured committed suicide or not, the fact that the association requested proofs of death, which were furnished, and the beneficiary, after her claim had been rejected because of suicide, prosecuted at some expense an appeal before the appellate tribunal of the association, does not operate as a waiver. *Ibid.*

24. Statements by a beneficiary in the proofs of death that the cause of insured's death was suicide are admissions against interest, and establish *prima facie* the fact of suicide. *Ibid.*

25. In an action on a mutual benefit certificate the evidence examined, and *held* to support a finding that the cause of insured's death was suicide. *Ibid.*

ACCIDENT.

Notice of injury: Conditions precedent.

26. The stipulation in a policy of accident insurance provided that the insured should give notice to the insurer within ten days of the accident with full particulars, or all claim to indemnity or benefit thereunder should be forfeited. *Held*, that notwithstanding the mandatory language of such a policy requiring such notice as a condition precedent to the right to recover, it should be read with an exception saving the rights of the assured from forfeiture for a failure to comply therewith, where he is totally incapacitated from acting in the matter. Such rule, however, would not apply where there is unequivocal language in the policy inconsistent therewith. *Comstock v. Fraternal Accident Asso.* 382

Hazards: Bicycle riding.

27. An accident insurance policy provided that if the assured was injured while engaged in any "occupation or exposure" more hazardous than that against which he was insured, his insurance should be such as the premium paid would purchase at the rates fixed for such increased hazard. "Occupations" were classified but exposures were not. Explanation was made that merely riding a bicycle for pleasure was not an "occupation," and that a person insured as in occupation a proprietor of a manufacturing industry did not change his status by incidentally riding a bicycle for recreation, or in going to or from his place of business. The policy of insurance in question specified plaintiff's occupation as proprietor of a chair factory and office duty. *Held*, that it was error to treat the act of

plaintiff in incidentally riding a bicycle for pleasure as placing him in a different class, as to hazard, from that named in the policy. *Comstock v. Fraternal Accident Asso.* 382

Policy holders. See LIMITATION OF ACTIONS, 1, 2.

INTEREST.

Where the time of payment of a debt is indefinite, and the creditor has not exercised the right to declare the term of credit at an end, except by bringing action on the debt, interest can only be recovered from the date of the commencement of the action. *Burke v. Sidra Bay Co.* 137

INTESTACY OR TESTACY? See WILLS, 5–8.

JANITORS. See LANDLORD AND TENANT, 2, 3.

JOINDER OF CAUSES OF ACTION. See ACTION, 3, 4. CORPORATIONS, 3. PLEADING, 3–8. VENDORS, 4.

JUDGMENTS.

On default: Proof: Discretion.

1. Subd. 2, sec. 2891, Stats. 1898, while it does not make it essential to the validity of the judgment that a verified complaint be supported by evidence, nevertheless preserves to the court the right and power, in its discretion, to require proof. *Sibley v. Weinberg,* 1
2. The exercise of such discretion against the rendition of a judgment without proof will not be reviewed on appeal, except in extreme cases showing clearly that the discretion has been abused. *Ibid.*
3. Upon an application for judgment on failure to answer in an action of replevin, it was not an abuse of discretion to require that the unlawful taking and detention be proved by evidence other than a complaint verified by an agent whose personal knowledge of such facts did not appear. *Ibid.*
4. After the ordering of a nonsuit in such case on the ground that the unlawful taking and detention had not been proven, the refusal of the court to reopen the case and permit plaintiff to supply further proof is *held,* though severe, not to have been a clear abuse of discretion. *Ibid.*

On discontinuance.

5. After issue joined by defendant's answer, on stipulation signed by defendant, an order was entered discontinuing the action, as to him, without costs. Afterwards, on application to set aside such discontinuance, and for judgment dismissing the complaint as to such defendant, with costs, the court granted the motion. *Held,* that even if the motion to set aside the order discontinuing the action was proper, it was error to enter a judgment dismissing the action with costs against plaintiff without a trial of the issues raised by such answer. *Garvin v. Crowley,* 496
6. In such case, judgment having been entered before the motion was made, on setting aside the order discontinuing the action, the appropriate relief to have been granted, if any, was a modi-

fication of such judgment so as to include a recovery for costs, or the granting of a motion dismissing the action as to defendant with motion costs in his favor, and not the entry of a second judgment. *Ibid.*

Setting aside and vacating. See ATTORNEY AND CLIENT, 1. SUMMONS, 6.

Reversal on appeal. See APPEAL, *Affirmance and reversal.* FALSE IMPRISONMENT, 2, 3.

Correction on appeal without new trial. See APPEAL, 17.

Action on foreign judgment.

7. Where there is no question as to the jurisdiction of the subject matter by the court in Ohio where a judgment was rendered against defendant, in an action thereon in Wisconsin, a finding that defendant voluntarily appeared in the prior action is supported by a writing, being part of the records of the foreign action, signed by defendant, declaring his appearance, and sent to plaintiff's attorney for the obvious purpose of being filed. *Christ v. Davidson,* 621

8. In an action on a foreign judgment it appeared, among other things, that one count in the petition filed therein set out the execution of a note and mortgage by defendant to a third party, and their transfer by an indorsee to plaintiff as collateral for a sum less than the face of the note. Judgment was demanded for the face of the note, which prayer was reiterated at the close of the petition, with the further prayer that the proceeds of the mortgaged property be paid to plaintiff, to the extent of his claim, and the balance to plaintiff's assignor. Defendant entered an appearance in writing, after which plaintiff's assignor appeared as defendant, adopting the petition throughout as his answer, "and the prayer thereof." Judgment of foreclosure and sale was taken on default, followed by sale, distribution of the proceeds by order of the court, and personal judgment in favor of plaintiff's assignor and against defendant for the deficiency. *Held,* that the petition contemplated a personal judgment against defendant, and that the judgment rendered, and on which action was brought in Wisconsin, was entirely responsive to the prayer and no wise exceeded the relief which defendant must have known was demanded, had he concerned himself to examine the petition filed in the action in which he voluntarily appeared. *Ibid.*

9. In such case, there being no lack of jurisdiction, either of the subject matter or of the person, the validity of the foreign judgment was not open to attack. *Ibid.*

JURISDICTION. See ARBITRATION, 2–6. ASSOCIATIONS. CERTIORARI. CHANGE OF VENUE, 1, 2. FALSE IMPRISONMENT, 1, 2. JUDGMENTS, 7, 9. JUSTICES' COURTS, 1–3, 7. SHIPPING. TRUSTS AND TRUSTEES, 4.

JURORS.

See APPEAL, 9.

A juror on his *voir dire* testified that he knew the parties, was not related to them, had not heard about the case, and could decide the case on the evidence without regard to who the lawyers were. *Held,* that the fact that the juror was the husband of the first cousin of one of the defendant's attorneys,—

a fact which was not known to plaintiff or his counsel until after the rendition of the verdict,—did not disqualify him from acting as a juror, and is not ground for reversal of the judgment. *Kelso v. Kuehl,* 495

JUSTICES' COURTS.

See FALSE IMPRISONMENT, 1, 3.

Adjournments.

1. From the docket entries of a justice of the peace it appeared that three adournments had been had, when, on plaintiff's request, "for the reason that his lawyer could not be present," a fourth adjournment was taken. *Held,* that the justice lost jurisdiction when he granted the fourth adjournment. *Holz v. Rediske,* 353

2. Where the docket entries of a justice of the peace show the cause on which a second adjournment was granted, no presumption can be entertained that proper cause therefor was shown, or that consent thereto was given, and, if the cause appearing on the docket is insufficient, the justice loses jurisdiction on granting such adjournment. *Ibid.*

Attachment for contempt: Jurisdiction.

3. Where a justice of the peace has lost jurisdiction, he has no power to issue a subpœna to compel the attendance of a witness, nor to issue an attachment for his appearance in that case. *Holz v. Rediske,* 353

4. In such case, the attachment being void, arrest and detention thereunder constitute false imprisonment as a matter of law. *Ibid.*

Appeals: Affidavit: Notice.

5. Plaintiff appealed from a judgment rendered against him in justice's court. The affidavit, signed by plaintiff, after naming him, described him as "the above named plaintiff and appellant," alleged that the appeal was in good faith and not for delay, and "that he is the *defendant* above named." That plaintiff was the appellant appeared beyond doubt or controversy from the entire record. *Held,* that the statement that appellant was *defendant* was mere surplusage, and could not serve to neutralize or render ineffective the otherwise complete and sufficient affidavit. *Ladd v. Witte,* 35

6. The defeated party in an action in justice's court presented to the justice a notice giving the name of the court, the formal title containing the names of the respective parties, the date and amount of the judgment and designation of the party taking the appeal. The required affidavit was not entitled, but was immediately below and upon the same side of the same sheet of paper as the notice of appeal, and stated it was made on behalf of "the defendant in the above entitled" and that "the appeal mentioned in the foregoing notice is made in good faith," etc. *Held,* that the affidavit showed on its face that it was made in the same action and referred to the same judgment as was mentioned in the notice of appeal, and came within the rule that an appeal from a judgment of a justice of the peace being purely statutory, the statute must be substantially complied with in order to give the appellate court jurisdiction. *Wattawa v. Jahnke,* 491

7. On an appeal from a justice's judgment, neither the notice nor the affidavit gave the name of the particular justice before whom the judgment was rendered, but the copy of the docket entries appearing in the record, and immediately following the notice and affidavit, recited that the appellant, naming the party subscribing the notice of appeal, "made and presented to me, the undersigned justice, a notice of appeal, affidavit of good faith, and undertaking in the above entitled action." *Held*, that the appeal papers complied with the statute and were sufficient to give the circuit court jurisdiction. *Ibid.*

LACHES. See EXECUTORS AND ADMINISTRATORS, 5.

LAND CONTRACTS. See INSURANCE, 8. VENDORS, 5, 6.

LANDLORD AND TENANT.

See VENDORS, 5.

1. Sec. 2187, Stats. 1898, provides that a tenancy from year to year may be terminated by a notice in writing given not less than thirty days prior to the expiration of the year. On refusal of a landlord to make repairs, a tenant from year to year stated that, if he was to remain on the premises, he would notify the landlord in two or three days. No such notice being given the landlord, more than thirty days before the expiration of the then current year, advertised the premises for rent, and posted "To Rent" notices on the premises. At the end of the year the tenant vacated, delivering the keys to the landlord. The tenant testified that when he moved he requested permission to stay two weeks longer which was refused. *Held*, that the trial court was justified in finding that the landlord had waived the giving of written notice as required by the statute, and had accepted a surrender of the premises when the tenant vacated. *Eimermann v. Nathan*, 124

2. A landlord authorized the janitor of his flat building to exhibit the premises to prospective tenants, execute leases, place the tenant in possession, and collect the first month's rent. The tenant was induced to enter into lease of a flat by the janitor's false assurance, not amounting to a warranty, that a wall, not open to inspection, between the flat leased and an adjoining building, was fire proof. The janitor had no express authority to make representations or warranties. *Held*, that the landlord was liable to the tenant for loss of goods by fire, the representations in question being so far within the scope of the business of the agency as to be deemed authorized. *Matteson v. Rice*, 328

3. The fact that the agent believed the representations to be true, and had no intention to deceive the tenant, would not affect the landlord's liability. *Ibid.*

4. An option contained in a lease provided that, in case the lessee "should wish to buy" the premises at any time during the period of the lease, the lessor would sell and deliver the same to the lessee, free and clear of all debts and taxes. The lessee made improvements relying on the option, and, eight days before the termination of the lease, gave the lessor verbal notice of his election to purchase, and was ever afterwards able, ready, and willing to receive a conveyance and make the payment. By reason of the absence of the lessor the lessee was

unable to make an actual tender and demand of a conveyance until nineteen days after the expiration of the lease, which was then done, the lessee meanwhile remaining in possession of the demised premises. *Held*, that the agreement only required the lessee to notify the lessor that he wished to buy and pay the price to make it a binding contract, and the notification given was sufficient. *Sizer v. Clark*, 534

5. In such case, by reason of the agreement contained in the lease, and the election of the lessee, the conventional relation of landlord and tenant was terminated and superseded by a contract for the purchase of the premises. *Ibid.*

6. In such case, it further appeared that the lessor, prior to the termination of the lease, conveyed to one who took with full knowledge of all the facts. The covenants contained in the lease were expressly made binding on the parties thereto and "their assigns." *Held*, that when the lessee, prior to the expiration of his lease, notified the lessor of his election to exercise the option to purchase, the lessor and his grantee both became bound to make the conveyance on payment of the agreed price to the lessor. *Ibid.*

7. In such case, it is not error to admit testimony as to the lessee's ability and readiness to pay the purchase price, and that the lessee had acted on the assumption that the contract was binding. *Ibid.*

LEGISLATURE. See CONSTITUTIONAL LAW, 1, 2.

LETTERS. See EVIDENCE, 3, 4.

LIENS.

Mechanics'. See BUILDING AND LOAN ASSOCIATIONS, 1, 3, 4.

Lienable demands: Fixtures.

1. Sec. 3314, Stats. 1898, provides that any person who furnishes materials or performs labor "for or in or about the erection, construction, repair, protection or removal" of any building shall have a lien therefor; and sec. 3315 gives such lien to a subcontractor on his complying with certain enumerated requirements. *Held*, that shelving of different lengths and widths, placed in the owner's building, by his order, so as to conform to the inside contour of the store, and toe-nailed to the walls and floor so as to make them stationary and permanent, sufficiently complies with the rule as to fixtures and supports a claim for a subcontractor's lien therefor. *Rinzel v. Stumpf*, 287

2. Under said secs. 3314, 3315, tables placed in the store building for use in the prosecution of the business there to be carried on, but having no connection with or attachment to the building, do not become fixtures, so as to support a mechanic's lien. *Ibid.*

3. Where lienable and non-lienable demands are charged in the same account, and there is no evidence indicating their respective values, the claim for lien cannot be supported under the rule that if the lienable articles can be readily ascertained from the account without a restatement thereof, the right to a lien is not impaired. *Ibid.*

4. Where a material man makes an entire contract to furnish thereunder for a fixed sum lienable and non-lienable articles,

a case is presented where the articles cannot be separated or apportioned so as to sustain a lien, and the claimant is not entitled thereto. *Ibid.*

Same: Subcontractor of a subcontractor.

5. Secs. 3314, 3315, Stats. 1898, give a mechanic's lien to principal contractors, subcontractors, material men and laborers, but not to a subcontractor of a subcontractor. The owner of land contracted with M. to build a building thereon for $1,000. M. sublet the entire contract to L. for $1,000, and L. sublet different parts of the work to various parties, who sought to establish their liens on the theory that the subletting to L. was fraudulent, and for the express purpose of placing them in the relation of subcontractors of a subcontractor. *Held*, that even if by reason of a conspiracy it could be held in equity that L. was in fact the principal contractor (a proposition not decided), participation of the owner in the conspiracy is absolutely essential to bind him. *Dallman v. Clasen*, 113

6. In such case the fact that the owner knew that L., instead of M., was in fact erecting the building, is entirely consistent with good faith, and would not support a finding of conspiracy based on that fact alone. *Ibid.*

7. In such case proof that L. made his bid with but an hour's deliberation does not justify the conclusion of fraud in the contract. *Ibid.*

Attachments. See ATTACHMENT, 7.

Attorney's. See ATTORNEY AND CLIENT, 2.

Consignee. See SALES, 3.

Mortgages. See BUILDING AND LOAN ASSOCIATIONS, 1, 3, 4.

Life insurance. See INSURANCE, 9–25.

LIMITATION OF ACTIONS.

See CORPORATIONS, 10, 12. EVIDENCE, 3. EXECUTORS AND ADMINISTRATORS, 11, 12. FRAUD, 10, 11. TRUSTS AND TRUSTEES, 1–3.

1. An action to wind up the affairs of a mutual fire insurance company was commenced November 15, 1890, the corporation then adjudged insolvent, and a receiver appointed. On May 8, 1900, the action was reorganized and certain policy holders, not theretofore parties, were made defendants. *Held*, that the statute of limitations began to run in favor of such policy holders November 15, 1890, and, until they were so made parties, and the summons issued against them, the statute did not stop running in their favor. *Boyd v. Mutual Fire Asso.* 155

2. Where insolvency of a mutual fire insurance company occurs during the life of a member's insurance therein, the action of the court under secs. 3216–3228, Stats. 1898, in adjudging such insolvency, granting an injunction and appointing a receiver, operates to cancel his policy in such company, and the statute of limitations begins to run from that date. *Ibid.*

3. A cause of action for misfeasance or malfeasance against officers or directors of a corporation is one in the right of the corporation, and, when brought by creditors after the insolvency of the corporation, is subject to such objections as the recalcitrant officers might have urged had the corporation brought the suit,

including the plea of the statute of limitations; sec. 4206, Stats. 1898, being general and comprehensive, and in itself making no exceptions as against trustees of any kind. *Ibid.*

4. Certain alleged creditors of a corporation, some of whom were officers and directors therein, brought an action to have it adjudged insolvent, for a winding up of its affairs, and procured the appointment of a receiver of the corporation therein. Subsequently such receiver was removed, and another appointed, who, with certain other creditors, reorganized the action and made the first receiver and said plaintiffs defendants. The amended complaint alleged collusion between the original plaintiffs and many acts of misfeasance and malfeasance on the part of such officers and directors. The action was reorganized more than ten years after it was commenced. No cause of action for maladministration was incorporated into the complaint until the reorganization of the action. *Held*, that no action to enforce the alleged liability of such officers and directors was commenced against them until such amended complaint was served. *Ibid.*

5. Where a new cause of action is introduced as an amendment to a pleading, the statute of limitations runs thereon until the making of the amendment. *Ibid.*

LOCAL LAW. See BUILDING AND LOAN ASSOCIATIONS, 2. CONSTITUTIONAL LAW, 1, 7.

MACHINERY. See MASTER AND SERVANT. SALES.

MALFEASANCE. See CORPORATIONS, 9. LIMITATION OF ACTIONS, 3, 4.

MALICE. See GARNISHMENT, 1.

MALICIOUS PROSECUTION. See GARNISHMENT.

MANDAMUS.

See CHANGE OF VENUE, 2.

1. After a relation has been filed and an alternative writ of *mandamus* issued, all matters going to the merits, whether by way of denial of facts asserted in the relation, or of other defensive matters, should be tried on due and proper pleadings, consisting of a return and an answer or demurrer thereto, and not on affidavits. *State ex rel. Holz v. Wolski*, 71

2. On appeal from *mandamus* proceedings, the record, unaccompanied by any bill of exceptions, and consisting merely of the relation, alternative writ, order denying the application on the merits, and judgment thereon, was transmitted to the supreme court; neither the order denying the application which recited the filing of affidavits in opposition to the application, nor the certificate of the clerk to the record on appeal, declared that such return contained all the papers filed, or that certain affidavits attached to the record were the ones used on the motion for such order. The clerk certified that the papers annexed were the original papers constituting the judgment roll, notice of appeal, and undertaking. *Held*, it would be presumed that circumstances existed sufficient to warrant the trial court's making the order dismissing the application. *Ibid.*

MARKET VALUE. See DAMAGES, 3.

MARRIED WOMEN. See HUSBAND AND WIFE. INSURANCE, 9–12. WITNESSES, 3.

MASTER AND SERVANT.

See ARBITRATION, 5, 6. RAILROADS, 5–9.

1. An employee who was accustomed to cast off belts from pulleys, but who had never before removed the belt from the pulley at the point at which he was killed, attempted to do so while standing on two transverse pieces of timber, of respectively six and four inch surface, and at an elevation of nineteen feet from the floor, to which he had stepped from a twelve-inch plank, with a guard rail on its side, located on the side opposite the pulley. *Held*, that the employee assumed the risk, and was guilty of contributory negligence precluding recovery. *Koepcke v. Wisconsin B. & I. Co.* 92

2. Assumption of risk is but a phase of contributory negligence, and it is immaterial whether the employee affected thereby be an adult or a minor. *Ibid.*

3. It being shown that an employee assumed the risk incident to dangerous premises, there is nothing prejudicial in excluding evidence tending to show that in other parts of the premises, where similar work was required, a safer place was provided. *Ibid.*

4. Where a person is liable in compensatory damages for personal injuries wrongfully inflicted by his servant while in the performance of duties as such servant, the principal cannot be visited with damages by way of punishment without proof that he directed the wrongful act to be done, or subsequently affirmed it. *Rueping v. C. & N. W. R. Co.* 625

5. In an action for personal injuries wrongfully inflicted by defendant's servant while in the performance of his duties as such servant, in the absence of proof that the principal has authorized or ratified the wrongful acts, proof of the degree of negligence, as to whether ordinary or gross, is improper and should not be submitted to the jury. *Ibid.*

6. In an action for personal injuries inflicted by defendant's servant while in the performance of his duties as such servant, where actionable negligence is admitted, and there can be no punitive damages, because the principal did not authorize or affirm the wrongful act of the servant, evidence of the circumstances of the injury are irrelevant and immaterial, unless of such special nature as to present, as one of the elements of compensation, sense of wrong or insult arising from an act apparently dictated by a spirit of wilful injustice, or a deliberate intent to vex or degrade. *Ibid.*

MAXIMS.
Caveat emptor, 400, 402, 415, 418, 427.
Expressio unius est exclusio alterius, 567.
Fides servanda, 426.
Res ipsa loquitur, 33.
Stare decisis, 219, 527, 534.
Vigilantibus et non dormientibus jura subveniunt, 393, 400, 426, 442.
Vigilantibus, et non dormientibus, servat lex, 413.
Vigilantibus, et non dormientibus, succurant jura, 424.

MEASURE OF DAMAGES. See BUILDING CONTRACTS, 2. DAMAGES, 1–3.

MECHANICS' LIENS. See FIXTURES. LIENS.

MENTAL CAPACITY. See GIFTS, 1.

METERS. See MUNICIPAL CORPORATIONS, 11–13.
MINORS. See MASTER AND SERVANT, 2.
MISFEASANCE. See CORPORATIONS, 9. LIMITATION OF ACTIONS, 3, 4.
MISJOINDER OF PARTIES. See PLEADING, 8.
MISREPRESENTATIONS. See PLEADING, 1.

MISTAKE.

See BILLS AND NOTES, 2.

Mere ignorance of the contents of a paper by one who becomes a party thereto under a mistake as to its import, will not enable him to avoid his act. *Bostwick v. Mutual Life Ins. Co.* 392

MORTGAGES.

See BUILDING AND LOAN ASSOCIATIONS, 1, 3, 4. CONTRACTS, 20, 22, 23. FIXTURES. HUSBAND AND WIFE, 6, 7.

The rule in Wisconsin, that a mortgagee, who, by reason of some default and under an option permitting such action in advance of maturity of the debt, seeks to foreclose his mortgage, must exercise his election and give notice thereof to the mortgagor before bringing suit, is a rule of equity, and, in the absence of some express or implied contract for such notice, a mortgagor, who has left his usual place of abode without making any provision for the forwarding of his mail, and without giving the mortgagee notice of change of address, is *held* to have waived giving any better notice than by mail, addressed to his usual place of abode last known to the mortgagee. *Julien v. Model B., L. & I. Asso.* 79

MUNICIPAL CORPORATIONS.

General charter law. See MUNICIPAL CORPORATIONS, 6–8.

Classification of cities. See MUNICIPAL CORPORATIONS, 9.

Ordinances: Construction: Violation. See RAILROADS, 1.

1. An ordinance provided that "no horse shall be permitted to run at large in the city," and that any person "who shall permit the same" to run at large shall be punished. *Held*, that negligence in not securing the horse from escape does not constitute violation of such ordinance, but it must appear that the horse was at large with the knowledge and assent or permission of the owner. *Decker v. McSorley*, 643

Officers: Compensation.

2. The city charter of Racine, under the head of "Assessors: their powers and duties," provides (sec. 20, ch. 40, Laws of 1891) that the assessors shall assess all the property in the city in one assessment roll; that "the assessment shall be reviewed and corrected and notice of such review shall be given," etc.; and that upon the correction of the assessment, the assessment roll shall be verified by the oaths of the assessors and deposited with the clerk. *Held*, that this makes it a part of the official duty of the assessors, to serve upon the board of review, and that for such service they are not entitled to compensation

beyond the salary fixed under sec. 15, which provides that such salary "shall be in full for all services by them to be rendered." *Morey v. City of Racine,* 8

Board of education. See SCHOOLS AND SCHOOL DISTRICTS.

Board of public works. See CERTIORARI, 3. MUNICIPAL CORPORATIONS, 11.

Encroachments: Compelling removal.

3. A municipal corporation can maintain an action in equity to obtain a mandatory injunction compelling the removal of an encroachment upon one of its public streets. Its right so to do is not dependent upon a prior making and service of the statutory order to discontinue the encroachment under sec. 1330, Stats. 1898. *Wauwatosa v. Dreutzer,* 117

Waterworks: Bonds: Elections.

4. Ch. 348, Laws of 1899, entitled "An act to authorize cities of the third and fourth classes to acquire waterworks and issue bonds therefor," by secs. 1–3 thereof, authorizes cities of the third and fourth classes to construct waterworks; requires, before proceeding with the construction, that the question of the building thereof shall be submitted to a vote of the electors of the city, and directs, if a majority of the ballots cast favor the proposition, that the common council may issue bonds for the unpaid cost of the works, which shall recite on their face that they are secured by trust deed or mortgage on the waterworks and that no municipal liability is created thereby. *Held,* that said ch. 348, Laws of 1899, is simply an enabling act, intended to provide a way by which cities of the third and fourth classes may purchase or build waterworks by the issuance of "non-liability" bonds, and not an act imposing further conditions upon cities which propose to issue "municipal" bonds, or as an act repealing existing legislation. *Appleton Waterworks Co. v. Appleton,* 363

5. Said ch. 348, Laws of 1899, so far as it purports to authorize such cities to build and operate waterworks, is declaratory of existing power, and must be construed as constituting one scheme and carrying but one definite purpose, and hence is not applicable to a case where a city, under definite authority, given elsewhere in the law, is about to build waterworks, and pay for them in cash or in "municipal" bonds, strictly so called. *Ibid.*

6. Ch. 326, Laws of 1889 (the general charter law), governs cities organized under its provisions, and all cities organized under special charters which shall in the manner therein specified adopt its provisions. Sec. 133 thereof authorizes the common council of all cities acting under the general charter law to issue bonds for the purpose, among others, of constructing waterworks, but provides that no bonds shall be issued therefor unless authorized by a three-fourths vote of the councilmen-elect. Ch. 312, Laws of 1893, amends said sec. 133 by adding another proviso, to the effect that in cities of less than 5,000 population the bond ordinance must be ratified by a vote of the people. This is now incorporated in sec. 925—133, Stats. 1898. At the same time ch. 311, Laws of 1893, was enacted, providing that cities, acting under special charters, having a population of 3,000 or more, should have power, among others, to issue bonds for waterworks by a three-fourths vote of the com-

mon council. This now appears as sec. 926—11, Stats. 1898, the population limitation having been stricken out. Secs. 942, 943, R. S. 1878, authorize cities to issue bonds for waterworks, but provide that no bonds shall issue until the proposition has been submitted to a vote of the people, and adopted by a majority of the electors voting thereon. Said secs. 942 and 943 were re-enacted, with additional provisions, in the Statutes of 1898. *Held:*

(1) That chs. 311 and 312, Laws of 1893, did not constitute a revision of the law on the subject, and thereby impliedly repeal so much of sec. 943, R. S. 1878, as imposed additional conditions on the exercise of the bonding power, but merely threw additional safeguards around the power to issue bonds.

(2) That a city operating under a special charter (ch. 441, Laws of 1885), and thereby prohibited from issuing bonds except in cases authorized by some law of the state, could not issue bonds for waterworks without first submitting the question to a vote of the inhabitants as provided by said sec. 943. *Ibid.*

7. Inasmuch as sec. 925—133, Stats. 1898, and sec. 926—11, Stats. 1898, both authorize the issue of bonds for waterworks, and are equally subject to sec. 943, Stats. 1898, if either is subject thereto, it is immaterial whether a city, acting under a special charter, has adopted the general charter law as to the provisions relating to waterworks, or whether, by virtue of ch. 165, Laws of 1899, incomplete and insufficient action of a special-charter city has become operative. *Ibid.*

8. Sec. 4987, Stats. 1898, provides that "none of the general provisions of these Revised Statutes shall be construed so as to affect or repeal the provisions of any special acts relating to particular cities unless such acts are enumerated in the acts hereby repealed." *Held*, that parts of the general charter law, adopted or attempted to be adopted by the city of Appleton and validated by ch. 165, Laws of 1899, did not become part of any special law relating to Appleton, but remained a general law, and were not changed in character by the fact that a city had chosen to adopt it. *Ibid.*

9. Sec. 926—11, Stats. 1898, governing cities operating under special charters, is a general law, applicable to a valid legislative class of cities, namely, all cities operating under a special charter. *Ibid.*

10. While, in cases of extreme doubt, the fact that great mischief may result from frequent and long continued violation of law by municipalities may be weighty, it does not justify courts in disregarding and overriding plain and imperative statute law. *Ibid.*

Waterworks: Rates: Meters. See CERTIORARI, 3.

11. By ch. 162, Laws of 1887, amending the charter of the city of La Crosse, there was established a new department of the city government, known as the "board of public works." Such board was thereby given power, subject to approval by the common council, to make by-laws, rules and regulations in relation to the waterworks of the city, and therein to fix uniform water rates to be paid for use of water furnished by such waterworks. Such powers had theretofore been conferred by the charter on the common council, but by the amendment the authority of the common council "to establish water rates to

be paid by persons using the water" was eliminated. The amendment further provided that the common council should have power "by ordinance to make and enforce all needful regulations for ascertaining the amounts to be paid as water rates by persons using the water." *Held*, that the dropping from the enumerated powers of the common council the unlimited power to fix water rates, and transferring unlimited authority in the matter to the board of public works, its action not to have the force of law until approved by the common council, made that method of dealing with that subject exclusive, and the common council was empowered to fix water rates only by acting upon the recommendation of the board of public works. *State ex rel. Hallauer v. Gosnell*, 606

12. Where a city charter authorizes the common council, by ordinance, to make and enforce all needful regulations for ascertaining the amounts to be paid as water rates by persons using the water, and necessary and expedient to protect such waterworks and the use thereof, and the whole scheme of the charter provision is, that the consumer shall bear all the expense necessary to enable him to take water from the public supply in the water mains, a requirement contained in an ordinance, adopted by the common council, that the consumers, in certain cases, at their own expense provide and use meters, and keep them in repair, is legitimate. *Ibid.*

13. In such case, the provisions of the ordinance requiring consumers using service pipes above a certain diameter to furnish meters, and leaving it optional with consumers using service pipes below that diameter, is not, as a matter of law, an unreasonable classification. *Ibid.*

Sidewalks: Injuries from defects: Primary liability of lot owner.

14. Under the charter of the city of Fond du Lac (ch. 152, Laws of 1883), a party suffering injury by reason of a sidewalk being out of repair must exhaust his remedy against the lot owner, as a condition precedent to his right to maintain an action against the city. In an action against said city for injuries occasioned by a defective sidewalk, in which the lot owner was joined, there was failure to plead and prove that plaintiff had exhausted her remedy against the lot owner. *Held*, that the action against the city could not be maintained, and it was not error to enter judgment in favor of the city. *Gordon v. Sullivan*, 543

15. In such action, no claim was made, either in the pleadings or upon the trial, that recovery was sought for an original faulty construction of the sidewalk, but the distinct claim was made from beginning to the end of the trial of failure to repair. The complaint was not amended. There was some slight testimony, which incidentally crept into the case, from which original faulty construction might be claimed. *Held*, that it was too late to make claim, for the first time in the supreme court, that the provisions of the charter of Fond du Lac (requiring exhaustion of remedy against lot owner before action against city could be maintained) did not apply to cases of original faulty construction. *Ibid.*

[16. Whether under the charter of Fond du Lac (ch. 152, Laws of 1883), there is a different rule as to bringing actions against the city based on negligence occasioned by an original faulty

construction of a sidewalk, from that occasioned by neglect to keep in repair, not decided.] *Ibid.*

17. In an action against a city and lot owner for personal injuries occasioned by lack of repair of a sidewalk, it is not error to exclude statements of a witness as to the condition of the walk at times which he was unable to locate as being anywhere near the time of the injury. *Ibid.*

18. In such case, it is not error to exclude statements of a witness that the condition of the sidewalk was bad. Such statements are mere conclusions and invade the province of the jury. *Ibid.*

Streets. See MUNICIPAL CORPORATIONS, 3. QUO WARRANTO. RAILROADS, 1, 2.

Actions against. See CERTIORARI, 2.

MUNICIPAL BONDS. See MUNICIPAL CORPORATIONS, 4, 5.

MUTUAL BENEFIT ASSOCIATIONS. See INSURANCE, 13–25.

MUTUALITY. See CONTRACTS, 5.

MUTUAL MISTAKE. See BILLS AND NOTES, 2.

NEGLIGENCE.

See BILLS AND NOTES, 8. DAMAGES, 4. FRAUD, 4, 7. HIGHWAYS. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 1, 14–17. RAILROADS, 3–12. STREET RAILWAYS.

1. In an action for personal injuries, an instruction to the jury defining "proximate cause" as the "direct and natural," and the "direct and producing cause without the existence of which such injury would not have occurred," is incorrect. It is not essential that the negligence complained of should be the direct cause of the injury. It is sufficient that it is the natural and probable cause, from which an ordinarily prudent and intelligent person ought, in the exercise of such intelligence, to have foreseen that an injury might probably result from the alleged negligence under like circumstances. *Meyer v. Milwaukee E. R. & L. Co.* 336

2. In an action for personal injuries happening through the alleged negligence of defendant, an instruction on the question of proximate cause, in substance, that the injury resulting from the negligent act must be such as a person of ordinary intelligence and prudence *would*, in the light of the surounding circumstances, have reasonably foreseen as the probable result of such want of care, criticised. The expressions *"ought," "should"* or *"might naturally"* in place of *"would"* are more accurate and ought to be used. *Ibid.*

3. In such case, instructions declaring the necessity that the ordinarily intelligent and prudent man ought to have foreseen not alone that some injury, but *"such injury"* as in fact resulted, states the rule governing proximate causation too stringently. It suffices to charge a person with liability for a negligent act, if some injury to another ought reasonably to have been foreseen as the probable result thereof by the ordinarily intelligent and prudent person under the same circumstances, even though the specific injury might not be so foreseeable. *Ibid.*

4. In an action for personal injuries caused by alleged negligent acts, instructions requiring the jury, in order to ascribe the

injury to defendant, to go further than the law requires, are not prejudicial on defendant's appeal. *Ibid.*

5. The rule that contributory negligence is not a defense to an intentional wrong does not apply to a situation where negligence is so inexcusable as not to be really a contributing cause, but to be really a cause intervening between the wrong and the injury as the real producing cause thereof. *Bostwick v. Mutual Life Ins. Co.* 392

6. He who is inexcusably negligent in a business transaction forfeits the right to judicial remedies for relief, and not because of any favor or indulgence which the law extends to the wrongdoer, but because of failure on the part of the injured person to exercise that care for his own protection which the policy of the law requires as a condition of its protection, such policy being to aid only those who exercise some reasonable care to guard their own interests. *Ibid.*

7. Negligence of a person in not asserting his right against another by whom he has been defrauded in a business transaction, is not a defense, strictly so called, to an action on the former's part for redress, but is evidence of submission to or waiver of the wrong, more or less strong according to the circumstances, and may be conclusive evidence thereof; or, it may be so gross as to forfeit such person's right to judicial redress; or, in connection with some injury to the wrongdoer, it may operate to estop such person from claiming redress for the wrong first inflicted. *Ibid.*

8. Where a jury upon sufficient testimony have found that an occurrence was a pure accident, without negligence on either side, the defendant is entitled to judgment. *Miller v. Casco,* 510

NEGOTIABLE PAPER. See ATTORNEY AND CLIENT, 1. BILLS AND NOTES. HUSBAND AND WIFE. JUDGMENTS, 8.

NEW TRIAL.

See APPEAL, 5, 16. RAILROADS, 4. STREET RAILWAYS, 1.

1. Where the court has granted a new trial on terms, and nothing appears in the record to the contrary, the fact that no ground is stated by the trial court for its ruling raises a presumption that it was granted in the exercise of the court's discretion because dissatisfied with the verdict. *Giese v. Milwaukee E. R. & L. Co.* 66

2. An order granting a new trial, based solely on the legal conclusion that a special verdict is inconsistent and evasive, is not an order made in the exercise of the court's discretion. *Miller v. Casco,* 510

"NON-LIABILITY" BONDS. See MUNICIPAL CORPORATIONS, 4, 5.

NONSUIT. See JUDGMENTS, 4. RAILROADS, 9.

NOTICE. See BILLS AND NOTES, 5. FRAUD, 5. INSURANCE, 26. JUSTICES' COURTS, 6, 7. LANDLORD AND TENANT, 1, 4. MUNICIPAL CORPORATIONS, 3. SALES, 5, 7–10.

NOVATION. See BILLS AND NOTES, 3.

NUISANCE. See CHANGE OF VENUE. 1.

OBSTRUCTIONS. See RAILROADS, 10–12.

OFFICERS. See CONSTITUTIONAL LAW, 3–7. CORPORATIONS, 7–9. FALSE IMPRISONMENT, 1–3. HIGHWAYS. LIMITATION OF ACTIONS, 3, 4. MUNICIPAL CORPORATIONS, 2. REGISTER OF DEEDS. SCHOOLS AND SCHOOL DISTRICTS.

OPTIONS. See BILLS AND NOTES, 2. CONTRACTS, 6, 10, 11, 14–16. LANDLORD AND TENANT, 4–7. MORTGAGES.

ORDINANCES. See MUNICIPAL CORPORATIONS, 1. RAILROADS, 1.

ORDINARY NEGLIGENCE. See MASTER AND SERVANT, 5.

PAROL EVIDENCE. See APPEAL, 7. BILLS AND NOTES, 2. CONTRACTS, 3. EQUITY, 3.

PARTIES. See PLEADING, 8. SCHOOLS, 3.

PARTITION. See SHIPPING.

PASSENGERS. See RAILROADS, 3, 4.

PERSONAL INJURIES. See DAMAGES, 4. HIGHWAYS. MASTER AND SERVANT. MUNICIPAL CORPORATIONS, 14–18. NEGLIGENCE. RAILROADS, 3–9. STREET RAILWAYS.

PHYSICIANS AND SURGEONS.

See PLEADING, 1, 2.

1. Where the court, in an action on *quantum meruit* for a physician's services, ruled that there was no proof of breach of warranty, and that the only question was the value of the services rendered, it is prejudicial error to give an instruction, in substance, that if plaintiff, as an inducement to be permitted to perform an operation, assured and guaranteed relief or recovery from the operation, and defendant relied thereon, the jury might take those facts and circumstances into consideration in determining the value of the services. *Ladd v. Witte,* 35

2. In such case the amount of damages demanded was $100, and there was no evidence to support a verdict for less than $50. *Held,* that an instruction that if the jury "should be of the opinion that the services were of value to defendant," they must determine the value, under all the credible evidence, at any amount up to $100, is erroneous, as indicating to the jury the existence of evidence to justify a verdict for any sum between zero and $100. *Ibid.*

3. In the absence of an express agreement to the contrary, a physician or surgeon who brings to the service rendered due skill and care, earns the reasonable and customary fee therefor, whether the outcome be beneficial to the patient or the reverse. *Ibid.*

4. Where in an action on *quantum meruit* for a physician's services, there is no conflict in the evidence of experts as to the reasonable value of the services rendered, the jury cannot disregard the same, and use their own judgment in determining their value. *Ibid.*

5. In an action on *quantum meruit* for a physician's services, it is not prejudicial error to refuse to instruct the jury that plaintiff is not precluded from recovering more than $50 by reason of having originally sent his bill for that amount, where the court, in the general instructions, had charged the jury to allow such sum as the evidence proved the value of the service to be, up to $100. *Ibid.*

PLEADING.

See ACTIONS, 1, 2. BILLS AND NOTES, 2, 3. CORPORATIONS, 3, 11. DESCENT. EQUITY, 1, 2. INJUNCTION. INSURANCE, 20. JUDGMENTS, 8. LIMITATION OF ACTIONS, 4, 5. SCHOOLS AND SCHOOL DISTRICTS, 1. TRUSTS AND TRUSTEES, 2, 3. VENDORS, 1-3.

1. A physician brought an action on *quantum meruit* in justice's court for services. After appeal taken, defendant was permitted by the appellate court to amend his answer and plead as a counterclaim a misrepresentation by plaintiff that the medical services were necessary. *Held*, that the counterclaim arose out of the same transaction stated in the complaint, and was properly pleadable. *Ladd v. Witte*, 35

2. In such case the ruling allowing the amendment, if erroneous, cannot be prejudicial to plaintiff, where the court, at the close of the evidence, withdrew the counterclaim from the jury, and directed them not to consider the same or allow anything thereon. *Ibid.*

3. Where a complaint attempts to state two causes of action, and the facts in either are insufficient to constitute a good separate cause of action, a demurrer will not lie for misjoinder. *Koepke v. Winterfield*, 44

4. A joint demurrer to a complaint for insufficiency on behalf of several defendants is bad if the complaint states a cause of action against any one of them. *Boyd v. Mutual Fire Asso.* 155

5. In an action by creditors and the receiver of an insolvent corporation against stockholders, officers and directors, and a former receiver thereof, allegations that the former receiver collected various sums of money belonging to the corporation, both before and after his appointment, which he converted to his own use, and also gross mismanagement as receiver, states a cause of action against him in favor of the plaintiff receiver, but not in favor of the creditors of the corporation. *Ibid.*

6. Where each of several demurrers to a complaint is based on an alleged misjoinder of several causes of action, and the complaint fails to state facts sufficient to constitute a cause of action as to one, such cause of action will not be considered in determining the alleged misjoinder. *Ibid.*

7. A complaint by certain creditors and the receiver of a corporation against a former receiver and directors and stockholders, stating an independent cause of action against such former receiver in favor of the new receiver, and also stating a cause of action in favor of the creditors against the directors and certain shareholders, is held bad for misjoinder of causes of action. *Ibid.*

8. Demurrer to a complaint for misjoinder of causes of action does not raise the question of misjoinder of parties plaintiff. *Somervaill v. McDermott*, 504

9. Where a demand, not embraced in the action, might require defendant to bring his evidence from a considerable distance, and can be made the subject of an independent action, it is no abuse of discretion, after both parties have rested, and a motion to direct a verdict has been argued, to refuse to permit an amendment of the complaint so as to state a cause of action thereon on *quantum meruit*. *Jacobson v. Tallard*, 662

POWER OF SALE. See WILLS, 1-4.

PRACTICE. See APPEAL. ATTACHMENT. ATTORNEY AND CLIENT. CHANGE OF VENUE. CONTRACTS, 2. EQUITY, 3. EXECUTORS AND ADMINISTRATORS, 2-6. FALSE IMPRISONMENT, 1, 2. JUDGMENTS. MANDAMUS. TRIALS.

PRAYER FOR RELIEF. See JUDGMENTS, 8.

PRECISE DATE OF OFFENSE. See ASSAULT AND BATTERY, 1.

PRESUMPTIONS. See DEEDS. EVIDENCE, 1, 2. FRAUD, 2, 5. JUSTICES' COURTS, 2. MANDAMUS, 2. NEW TRIAL, 1. TRIALS, 6. WILLS, 7.

PRINCIPAL AND AGENT.

See CONTRACTS, 15, 16. EQUITY, 1, 2. INSURANCE, 22. LANDLORD AND TENANT, 2, 3. SALES, 1, 5.

While an agent may not do everything his principal may do, where a representation by the agent directly appertains to and becomes a necessary part of the transaction under consideration, and an inducement to its acceptance by the party to whom the representation is made, it may be said that such matter falls "within the scope of the agency." *Matteson v. Rice*, 328

PRINCIPAL AND SURETY. See EXECUTORS AND ADMINISTRATORS, 7-13. HUSBAND AND WIFE, 2, 4.

PRIORITIES. See BUILDING AND LOAN ASSOCIATIONS, 1, 4.

PRIVATE LAWS. See BUILDING AND LOAN ASSOCIATIONS, 2. CONSTITUTIONAL LAW, 1, 7.

PRIVITY. See CONTRACTS, 18-23.

PROBABLE CAUSE. See GARNISHMENT, 1.

PROCESS. See ATTACHMENT. GARNISHMENT. SUMMONS.

PROMISSORY NOTES. See ATTORNEY AND CLIENT. BILLS AND NOTES. HUSBAND AND WIFE. JUDGMENTS, 8.

PROMOTERS. See CORPORATIONS, 1-3.

PROOF.
Of loss. See INSURANCE, 22-24.
Of service. See SUMMONS, 5, 6.

PROXIMATE CAUSE. See NEGLIGENCE, 1-3. RAILROADS, 8, 11, 12.

PUBLIC POLICY. See BUILDING AND LOAN ASSOCIATIONS. CONSTITUTIONAL LAW, 2. INSURANCE, 13.

PUBLICATION OF SUMMONS. See SUMMONS, 1-4.

PUNITIVE DAMAGES. See MASTER AND SERVANT, 4-6. RAILROADS, 3.

QUALIFICATION. See JURORS.

QUO WARRANTO.

1. A private corporation is a "person" within the meaning of sec. 3466, Stats. 1898, providing that an action may be brought by the attorney general in the name of the state "when any person shall usurp, intrude into or unlawfully hold or exercise any public office, civil or military, or any franchise within the state." *State ex rel. Vilter M. Co. v. M., B. & L. G. R. Co.* 142

2. A street railway franchise to operate a system of street railways in a city, using the streets and alleys for that purpose, is a

"franchise" within the meaning of said sec. 3466. The state may by *quo warranto* inquire into the title by which it is held, and, if the party assuming to exercise it has no title thereto, judgment of ouster will be rendered. *Ibid.*

3. Under said sec. 3466, Stats. 1898, a commercial railroad, by a formal acceptance under seal, as the ordinance required, accepted a franchise to construct and maintain a street railway over certain streets in the city of Milwaukee. *Held*, that it was holding and exercising the franchise, attempted to be granted, within the meaning of sec. 3466, Stats. 1898, as fully as if it had started to build its structure. *Ibid.*

RAILROADS.

See QUO WARRANTO. STREET RAILWAYS.

Franchise to occupy street: Power to accept.

1. A city ordinance granted to a commercial railroad, organized under sec. 1820, Stats. 1898, "its successors and assigns," the right to construct an elevated railroad over certain streets, many of which contained surface street railways. The ordinance was denominated a franchise; contemplated the erection of passenger stations, etc.; limited the rate of fare within the city; required the carriage of policemen, firemen and health officers free, and required the company to build and maintain certain bridges for the accommodation of teams and foot passengers as well as its trains. *Held*, that the ordinance attempted to, and did, grant a franchise to operate an elevated street railway, under sec. 1862, Stats. 1898, and that it was not a mere code of police regulations, regulating the use of the right conferred on commercial railroads by sec. 1828, Stats. 1898, to build and maintain their road across or along any street. *State ex rel. Vilter M. Co. v. M., B. & L. G. R. Co.* 142

2. An ordinary commercial railroad organized under sec. 1820, Stats. 1898, is not endowed with the power to accept street railway franchises under said sec. 1862, Stats. 1898. *Ibid.*

Injuries to passengers: Damages.

3. In an action against a railroad company for personal injuries caused by a collision, actionable negligence was admitted. Punitory damages could not be recovered because negligence of defendant's servants was not shown to have been either authorized or approved by it. Plaintiff's counsel throughout the trial made contentions (with which the rulings of the court were in harmony) that the defendant was guilty of gross and criminal negligence; that mere compensation to plaintiff, in view of the enormity of defendant's fault would be inadequate, and appealed to the jury to fix compensatory damages with regard to defendant's ability to respond. *Held*, that although the jury found there was no gross negligence, the erroneous admission of evidence of gross negligence was prejudicial error. *Rueping v. C. & N. W. R. Co.* 625

4. In an action for personal injuries suffered in a railroad collision it appeared, among other things, that plaintiff, a man forty-five years old, engaged in office work, suffered a compound fracture of his leg below the knee; that there was no evidence of great pain, or of probable future suffering; that recovery had been rapid; that he was able to attend to his business

substantially as before, and that his only permanent difficulty was a looseness in the knee joint, permitting a slipping outward as the weight of the body was thrown upon the imperfect limb. *Held*, that a verdict for $12,000 damages was largely in excess of what was warranted by the evidence and the law, and that a new trial should be granted unless plaintiff remitted all damages in excess of $2,500. *Ibid.*

Injury to bystander: Negligence of engineer.

5. Upon the evidence in this case it is *held* to have been a question for the jury whether a torpedo placed upon the track in front of an engine was put there by the fireman without the knowledge of the engineer, or by the engineer himself. *Euting v. Chicago & N. W. R. Co.* 13

6. Railroad torpedoes should, as matter of law, be considered as dangerous agencies. *Ibid.*

7. An engineer in whose custody a railway company has placed torpedoes to be used only as signals to trains, who for his own amusement puts one of such torpedoes upon the track in dangerous proximity to third persons, and then moves his engine over it, causing it to explode and injure one of such persons, is not acting beyond the scope of his employment, but is violating a duty resulting from such employment, and the company is responsible for his acts. *Ibid.*

8. An engineer who, knowing that a torpedo has been placed upon the track in front of his engine in close proximity to bystanders, moves his engine over it in the course of his employment, is guilty of a negligent act for the proximate result of which the railway company is liable. *Ibid.*

Injury to employee: Assumption of risk: Negligence of fellow servant.

9. Plaintiff was injured while assisting in unloading a car loaded with lumber. The lumber consisted of a tier of planks along each side of the car, between which lumber of various sizes had been thrown in. The tiers of planks were retained by stakes fitted into sockets along the outer edges of the car. The car was tilted so that one side was lower than the other. While the car was being unloaded, one of the gang of laborers in which plaintiff was working, and in his presence, knocked out the stakes on the lower side of the car, lumber was pushed out over the tier of plank on that side, and a few minutes after the piles on that side fell on plaintiff. *Held*, that a nonsuit was proper, since, if the pile fell from the mere action of physical forces, the conditions were obvious, and assumed by plaintiff, and if from the removal of the stakes, or from pushing lumber over an unsupported pile, the negligence was that of a fellow servant. *Schultz v. C., M. & St. P. R. Co.* 31

Waters: Bridges: Obstructions.

10. Where, in an action against a railroad company for damages to lands caused by the overflow of a stream obstructed by a bridge erected and maintained by defendant, there was no material issue presented by the testimony except as to the amount of damages, errors in instructions to the jury in submitting other questions are immaterial. *Schmeckpepper v. C. & N. W. R. Co.* 592

11. In an action for damage to land from overflow caused by an embankment built by defendant with inadequate provision for

carrying off the water of a stream, it is not necessary to a recovery that the particular damage caused should have been within the anticipation of a reasonably prudent person. *Ibid.*

12. In an action for damages to land due to an embankment built by defendant, with inadequate provision for carrying off the water of a stream, causing an overflow of water during a specified storm, the evidence of damage was confined to that of experts, who testified to examinations of the land just before and just after that storm. *Held*, that it was immaterial whether other storms, preceding and subsequent to the storm specified, did or did not cause damage. *Ibid.*

RATIFICATION. See ARBITRATION, 5, 6. MASTER AND SERVANT, 4–6.

REAL PROPERTY. See FIXTURES. HUSBAND AND WIFE, 5–7. INSURANCE, 8. LIENS. MORTGAGES. VENDORS.

RECEIPTOR. See ATTACHMENTS, 7.

RECEIPTS. See EVIDENCE, 3, 4. REFORMATION OF INSTRUMENTS. TRIAL, 7.

RESCISSION. See ACTION, 4. BUILDING CONTRACTS, 1. CONTRACTS, 19. FRAUD, 8–12. INSURANCE, 13. MISTAKE.

RECORDING OF INSTRUMENTS. See DEEDS.

REFORMATION OF INSTRUMENTS.

See TRIAL, 7.

On the issue whether a written receipt for the payment of money should be reformed, so as to express that the amount paid was in full payment, settlement, satisfaction and discharge of any and all claims held by the receiptor, the evidence (stated in the opinion) is *held* to establish the right of such reformation. *Kammermeyer v. Hilz*, 313

REGISTER OF DEEDS.

See CONSTITUTIONAL LAW, 3–7.

Prior to the time ch. 169, Laws of 1895, took effect, the register of deeds of Milwaukee county was compensated by fees and not by a salary, but that statute placed his office on a salary basis, and provided that the register should quarterly pay to the county treasurer all fees and emoluments of "every kind" received by him as register. Such provision was continued in the revision of 1898 which took effect September 1, 1898. *Held*, that such statutory provisions embraced fees for registering of births, marriages, and deaths. *Verges v. Milwaukee Co.* 191

RELATIVES. See EXECUTORS AND ADMINISTRATORS, 1.

REMARKS OF COUNSEL. See APPEAL, 8, 9. EVIDENCE, 4. RAILROADS, 4.

REMAINDERS. See WILLS, 12, 13.

REPEAL of statute. See BUILDING AND LOAN ASSOCIATIONS, 4.

REPLEVIN. See JUDGMENTS, 3.

REPRESENTATIONS. See PLEADING, 1. PRINCIPAL AND AGENT. WARRANTY.

RES ADJUDICATA.

See WILLS, 13.

Where a trial court refuses to dissolve an injunction such ruling is not *res adjudicata* on appeal. *Madden v. Kinney,* 561

RESULTING TRUSTS. See ACTION, 2.

REVOCATION. See CONTRACTS, 15.

SALES.

See BILLS AND NOTES, 6. CONTRACTS, 2-13. CUSTOM AND USAGE, 1. DAMAGES, 1-3.

1. Defendant ordered a machine through plaintiff's agent, the written order stipulating that the machine was guaranteed to give "entire satisfaction." Plaintiff wrote defendant asking for "confirmation of the order," stating that he did not like the term "entire satisfaction." Defendant in reply stated that, after being thoroughly tested, if the machine proved as represented he would keep it, and pay for it, and referred to the original written order as a "conditional order." *Held,* that the subsequent correspondence in no way changed the terms of the order. *Weeks v. Robert A. Johnson Co.* 105
2. A contract for the sale of a machine was on a printed form, and the written part of the order stated that entire satisfaction was guaranteed. On the margin there was printed "Goods shipped at buyer's risk" and "all claims for deficiencies must be made within fifteen days after receipt of goods." *Held,* that such printed matter did not destroy or change the terms and conditions written in the order. *Ibid.*
3. Defendant purchased a machine from plaintiff on condition that it worked satisfactorily. In attempting to use it he spoiled considerable material, and, at plaintiff's request, had a duplicate part made for one portion. After having decided that it was not satisfactory, defendant offered to return the machine to the plaintiff on receipt of payment for the material damaged and his expenditures for the duplicate part. Sec. 3345, Stats. 1898, provides that "every consignee of property shall have a lien thereon for any money advanced by him to or for the use of the person in whose name the shipment of such property is made." *Held,* that the mere fact that defendant proposed to return the machine upon receipt of payment for his whole claim, including that for damaged material for which he had no lien, was not a waiver of the lien for his expenditures in supplying the duplicate part. *Ibid.*
4. In such case the retention of the machine did not amount to an acceptance. *Ibid.*
5. Defendant ordered a machine of plaintiff's agent, to be accepted if satisfactory, and, having difficulty with it, notified plaintiff, who answered that he had written the agent; that the agent would go and see the machine, and expressed confidence that matters would be satisfactorily arranged. Plaintiff testified that he had "turned the matter over to" the agent. When defendant made claim for certain damaged material, plaintiff stated he would see the agent, that he had nothing to lose, and that he would look to the agent for the claim. *Held,* that a sub-

sequent notice by defendant that the machine was unsatisfactory and would be returned, was properly sent to the agent. *Ibid.*

6. Defendant ordered from plaintiff a "chocolate dipping machine," agreeing to purchase it if it did the work it was represented to do. Plaintiff suggested that, in order to run the machine to its guaranteed capacity, defendant should have four extra screens, which defendant ordered and plaintiff furnished. The screens constituted a part of the machine, and were of no use in any other machine or for any other purpose. *Held*, that there was no foundation for extra charge for the screens. *Ibid.*

7. By a contract for the sale of an electric motor the seller made certain warranties, and it was agreed if, on starting the motor, it did not comply with the warranty the purchaser should "promptly notify" the seller at his address "by telegraph or mail, stating wherein said machinery is faulty," no time limit being stated. *Held*, that compliance with such requirement was a condition precedent to the existence of any claim under the guaranty, and that such compliance must be within a reasonable time after starting the motor. *Northern E. M. Co. v. H. M. Benjamin C. Co.* 130

8. In such case, a delay of two and one half months in notifying the seller of defects claimed to exist, is not a reasonable time. *Ibid.*

9. In such case notice that the machine "did not perform the work which it was required to do" does not comply with the requirement that the purchaser should notify the seller "wherein the machine was faulty." *Ibid.*

10. The seller of a machine warranted it, providing the purchaser, on receiving and starting the machine, promptly notified the seller, by mail or telegraph, of any defects claimed. The seller acted upon and remedied a slight defect, which developed before the machine was set up. There was evidence that communications passed between the seller and its agent about the purchaser's having trouble with the machinery subsequent to the difficulty that was remedied, but that the seller did not act on the later information. *Held*, that the seller did not thereby waive the conditions of the guaranty requiring notice. *Ibid.*

SALARY. See CONSTITUTIONAL LAW, 3, 6. MUNICIPAL CORPORATIONS, 2. REGISTER OF DEEDS.

SATISFACTION OF MORTGAGE. See CONTRACTS, 22, 23.

SCHOOLS AND SCHOOL DISTRICTS.

1. Sec. 514, R. S. 1878, declared that the several boards of education in cities should determine what school books should be used, and that any such board might be authorized by the board of aldermen, common council, or trustees to purchase text books for use in the public schools. Sec. 515 declared that such board should be charged with all the duties imposed on school district boards, so far as they were not expressly provided for or limited by special provisions of the act of incorporation, or other act under which such body was constituted, and that every city not having a system of school government specially provided by law should be governed by the provisions of ch. 27, R. S. 1878. Sec. 514 was amended at various times

and, as amended by ch. 308, Laws of 1891, was, as sec. 440*a*, re-enacted *verbatim* as part of the codification of the school laws of 1897 (ch. 354, Laws of 1897), and is now sec. 440*a*, Stats. 1898. Sec. 515 was dropped out of the codification of 1897, but less than four months thereafter was literally re-enacted by the same legislature, and is now sec. 515, Stats. 1898. The charter of Fond du Lac (sec. 10, subch. XV, ch. 152, Laws of 1883) provides that the board of education "shall establish the text books to be used" in that city. Sec. 4986, Stats. 1898, provides that the laws contained in the Revised Statutes shall apply to and be in force in each city in the state, as far as the same are applicable *and not inconsistent with the charter of any such city*, but that when the provisions of any such charter are at variance with the provisions of the Revised Statutes, the provisions of *such charter shall* prevail unless a different intention is plainly manifested. *Held:*

(1) That neither sec. 514, as it existed in the Revised Statutes of 1878, nor as modified and finally reduced to the form expressed in sec. 440*a*, Stats. 1898, took away any of the powers granted by ch. 152, Laws of 1883, to the board of education of the city of Fond du Lac.

(2) That such board of education had the power to make an order for furnishing text books in the public schools of Fond du Lac, binding upon the tax payers and patrons of its schools for the term of five years, without the approval of the common council.

(3) That such board of education having such power, in an action to restrain the execution of such an order, allegations of the complaint as to inexpediency, impropriety, and bad motives of certain members of the board are of no significance. *Madden v. Kinney*, 561

2. Under the charter of Fond du Lac (ch. 152, Laws of 1883), the board of education has the power to establish the text books to be used in such city, and, acting under that power, such board adopted certain text books "as the regular text-books" in the branches thereby covered "in the city schools of Fond du Lac for the next five years" then following, and entered into a five-year contract with the publishers to furnish to purchasers the latest edition thereof at certain enumerated prices. In an action to restrain the consummation of such contract, the complaint, in addition to setting forth the facts as to the contract, contained numerous allegations of undue influence brought to bear upon certain members of the board, and bad motives on their part in the action taken. A preliminary injunction was granted which the court refused to dissolve. *Held*, that the complaint failed to state a cause of action for an injunction, or any equitable relief, and the injunction was improperly granted and improperly continued. *Ibid.*

3. Where a board of education is a mere agency or instrumentality of the city government, and, as such, incapable of being sued, it is not, as such, a necessary party to an action to enjoin the consummation of an order of such board changing the school books to be used in the city schools. *Ibid.*

SCOPE OF AGENCY. See LANDLORD AND TENANT, 2.

SEPARATE ESTATE. See HUSBAND AND WIFE, 3.

SERVICE OF PROCESS. See SUMMONS.

SETTLEMENT. See ATTORNEY AND CLIENT.

SHELVING. See LIENS, 1.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 14–18.

SIGNATURES. See BILLS AND NOTES, 1.

SHIPPING.

1. Sec. 563, R. S. of U. S., provides that the federal district courts shall have exclusive jurisdiction of all civil causes of admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." *Held*, that the jurisdiction of federal courts over the rights of part owners in vessels on the great lakes is not exclusive, and that a suit to partition such a vessel between tenants in common is maintainable in the courts of Wisconsin. *Reynolds v. Nielson*, 483

2. The fact that the admiralty courts have no admiralty or maritime jurisdiction to compel partition of a vessel, where there is a majority owner, does not affect the jurisdiction of state courts to afford such relief. *Ibid.*

SLANDER.

Where, in an action for slander, the speaking of the slanderous words is denied by the defendant, and by one other witness present when the alleged slander was uttered, the jury is justified in finding a verdict for the defendant. *Kelso v. Kuehl*, 495

SPECIAL LEGISLATION. See BUILDING AND LOAN ASSOCIATIONS.

SPECIAL VERDICT. See APPEAL, 13. BILLS AND NOTES, 7. CONTRACTS, 6. GARNISHMENT, 1. HIGHWAYS, 1. STREET RAILWAYS. TRIAL, 8.

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STREET RAILWAYS.

See QUO WARRANTO, 2. RAILROADS, 1, 2.

1. In an action against a street railway for negligently killing plaintiff's intestate the evidence was such as would justify a finding of contributory negligence, and on that subject the special verdict contained inconsistent answers. *Held*, that there was no abuse of discretion in granting a new trial because of

the unsatisfactory character of the verdict. *Giese v. Milwaukee E. R. & L. Co.* 66

2. In an action against a street car company for personal injuries alleged to have been caused by defendant's negligence, the defense of contributory negligence in attempting to board the car before it had stopped was interposed. In submitting to the jury the special question of plaintiff's contributory negligence, the court, in its instructions thereon, referred the jury, without repeating, to the definitions of ordinary care and proximate cause already given. No other negligence of plaintiff was suggested by any of the evidence in the case, nor was there any request for finding by the jury upon any other phase of negligence attributable to plaintiff. *Held*, that error in that respect, if any, was cured by the answer of the jury to another question of the special verdict, finding that plaintiff did not attempt to board the car while in motion. *Meyer v. Milwaukee E. R. & L. Co.* 336

STREETS. See MUNICIPAL CORPORATIONS, 3, 14–18. QUO WARRANTO. RAILROADS, 1, 2.

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SUICIDE. See INSURANCE, 22–25.

SUMMONS.

See ATTACHMENT.

1. The statutory requisites to the granting of an order for service of a summons by publication being satisfied, the right to such order is absolute regardless of whether the essential allegations of the complaint and affidavit upon which it is based are true or not. *Gallun v. Weil*, 236

2. Neither the issuance of a writ of attachment nor the seizure of property thereunder is requisite to an order for service of a summons by publication in any case. *Ibid.*

3. The right to make service of a summons by publication only affects the thing sought to be reached in the action; therefore, where the thing is property of the defendant within this state, the order for service by publication by the express words of the statute is granted upon the complaint, duly verified and filed, and an affidavit, together showing the facts required to exist, which in no case includes seizure of property into the custody of the law. Sec. 2640, Stats. 1898. *Ibid.*

4. An affidavit for service of a summons by publication being made one day before the granting of the order, and stating that the plaintiff is unable with due diligence to make service of the summons upon the defendant, and further stating the diligence exercised to make such service to be the placing of the summons in the hands of an officer for service, and his inability to serve the same, as evidenced by his return thereon dated fifteen days before the making of such affidavit, is not, as a matter of law, insufficient to support the order as regards the statutory requirement that it shall be made to appear that

plaintiff is unable with due diligence to serve the summons upon the defendant. *Ibid.*

5. Where the sheriff's return on a summons certifies that one defendant could not be found, but that the sheriff served the summons on such defendant by delivering a true copy to his wife, a person of suitable age and discretion, etc., and also that he served the same personally on the wife by delivery of a copy, such proof of service is not overcome by affidavits of such defendant and his wife, made five years thereafter, that such service was not made, when it further appears that such defendant had made two prior affidavits entitled in the action, stating that he was a defendant therein, and asking in one for a substitution of attorneys, and in the other for leave to file an amended answer. *Illinois Steel Co. v. Dettlaff,* 319

6. Where the sheriff's return upon a summons shows a legal service thereof upon the defendant, upon motion to set aside the service and vacate judgment entered in the action, the showing that no service was ever made must be "*most satisfactory.*" *Ibid.*

SUPERINTENDING CONTROL OF SUPREME COURT. See CHANGE OF VENUE, 2, 3.

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SURPLUSAGE. See JUSTICES' COURTS, 5.

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TENANCY.
At sufferance. See VENDORS, 5.
From year to year. See LANDLORD AND TENANT, 1.
In common. See SHIPPING.

TENDER. See CONTRACTS, 9.

TESTACY OR INTESTACY? See WILLS, 5–8.

TESTAMENTARY TRUSTEES. See EXECUTORS AND ADMINISTRATORS, 8. TRUSTS AND TRUSTEES, 5. WILLS, 1–4.

TEXT-BOOKS. See SCHOOLS AND SCHOOL DISTRICTS.

TORPEDO. See RAILROADS, 5–8.

TRAVELING SALESMAN. See CONTRACTS, 1. GUARANTY.

TRAVERSE. See ATTACHMENT, 5.

TRIAL.

See APPEAL. CHANGE OF VENUE. GARNISHMENT, 1. JUDGMENTS. MANDAMUS.

Nonsuit. See RAILROADS, 9.

Instructions to jury. See ASSAULT AND BATTERY, 1, 2. CONTRACTS, 7–9. CUSTOM AND USAGE. DAMAGES, 1. EVIDENCE, 4. EXECUTORS AND ADMINISTRATORS, 1. NEGLIGENCE, 1–4. PHYSICIANS, 1, 2, 5. PLEADING, 2. RAILROADS, 10. STREET RAILWAYS, 2. WITNESSES, 1, 2.

1. Exceptions to refusal to instruct the jury subserve their purpose, and are taken in due time, if taken after the retirement of the jury and before verdict. *Gehl v. Milwaukee Produce Co.* 263

2. It is not error to inform the jury at whose request certain instructions are given. Such practice is, however, disapproved. *Meyer v. Milwaukee E. R. & L. Co.* 336

3. On the trial of an action the court, in presenting the issues to the jury, read to the jury portions of the defendant's pleading. The charge was fair throughout. *Held*, that no error was thereby committed. *Sizer v. Clark*, 534

4. In an action on an express contract the defendant is not prejudiced by correct instructions as to implied contracts, the jury having been expressly charged that there can be no recovery on an implied contract. Such instructions amount to a warning to the jury, fairly tending to warn them against the error of bringing in a verdict based on an implied agreement, in case an express contract was not shown to their satisfaction. *Oates v. Erskine's Estate*, 586

Direction of verdict. See CONTRACTS, 2. FALSE IMPRISONMENT, 1, 2.

Findings: Special verdict. See SLANDER.

5. A finding of the trial court, "that plaintiff wholly failed to substantiate his allegations by a preponderance of evidence," standing alone, fails to declare the issuable facts upon which such conclusion is announced, and does not comply with sec. 2863, Stats. 1898, requiring the trial judge in his decision to state the facts found by him. *Milwaukee Nat. Bank v. Gallun*, 74

6. Where in a preamble to his findings the trial judge described plaintiff's claim as to two issues of fact, and then finds "that plaintiff wholly failed to substantiate his allegations by a preponderance of evidence," such finding will be presumed to apply to those issues and to negative them. *Ibid.*

7. On the trial of an issue whether a written receipt for the payment of money should be reformed, so as to express that the amount paid was in full payment, settlement, satisfaction and discharge of any and all claims held by the receiptor, the verdict of the jury is merely advisory. *Kammermeyer v. Hilz*, 313

8. Where a special verdict taken on the trial of an equitable issue is adopted by the court it must be regarded as the findings of the court. *Ibid.*

TRUST-FUND DOCTRINE. See CORPORATIONS, 7–9.

TRUSTS by operation of law. See TRUSTS AND TRUSTEES, 1, 2.

TRUSTS AND TRUSTEES.

See ACTION, 1–3. CORPORATIONS, 7–9. EQUITY, 1, 2. EXECUTORS AND ADMINISTRATORS, 8. WILLS, 1–4, 14–18.

1. Trusts arising otherwise than by contract *inter partes*, trusts created by operation of law, whether implied, resulting, or constructive, and all trusts founded in contract having some of the elements of express trusts and properly referred to as such, though not belonging to that species of express trusts cognizable only in a court of equity, are subject to the statute of limitations. *Buttles v. De Baun*, 323

2. A complaint alleged, among other facts, that defendant, acting as agent for plaintiff, sold land belonging to plaintiff and received the whole consideration, part of which defendant converted to his own use; that afterwards plaintiff consented to the retention of such sum on condition that defendant use it to pay a debt due by plaintiff to a third person. The complaint further alleged that such agreement of defendant was not kept, and that defendant at no time assumed any position inconsistent with being a trustee of such fund, but plaintiff failed to plead that the defendant had assented to the alleged agreement. *Held*, under the allegations of conversion, that defendant became a constructive trustee, or trustee by operation of law, and hence not within the judicial rule exempting express trusts from the operation of the statute of limitations. *Ibid.*

3. In such case, the complaint further alleged facts showing that the conversion by defendant of the proceeds of the sale took place, and knowledge thereof was brought home to plaintiff, more than twenty years before the commencement of the action. *Held*, that the use of the trust fund by the trustee for his own benefit, and in a way clearly inconsistent with the trust, was such a repudiation of the trust as brought it within the rule that the statute of limitations begins to run from the time when the repudiation of the trust is brought home to the person entitled to enforce it, and that therefore plaintiff's demand was barred. *Ibid.*

4. A trust never fails for want of a trustee. Where the office becomes vacant the trust continues, its execution only being interrupted, and judicial power, under equity jurisdiction, will compel and supervise the execution of the trust where there is no statute providing for the emergency. *McWilliams v. Gough*, 576

Testamentary trustees.

5. Under sec. 4025, Stats. 1898, the giving of such bond "as the court may order" is made essential to the official character of a testamentary trustee to perform the trust. Under sec. 4026, any person appointed testamentary trustee, who shall refuse to give the bond required, or neglect to do so for twenty days after receiving notice that such bond is required, shall be deemed to have declined such trust, and under sec. 4027, any testamentary trustee appointed by the court, on failure of the trustee named in the will to qualify, shall be subject to the provisions of the statute regarding trustees appointed by will, and "the estate so given in trust shall vest in such trustee in like manner, to all intents and purposes, as the same vested in the original trustee named in such will." Testatrix devised her property to G. as executor and trustee, to be held in trust for the support of a step-son, and, on his death, to sell the same and divide the proceeds among her children. The executor and trustee qualified as executor and administered the estate, and final judgment was entered therein, assigning the estate to G. as trustee, but G. never gave bond as such trustee. *Held*, that the title to testatrix's estate vested in G. as executor and trustee by force of the will, regardless of his failure to qualify as such trustee, his right to execute the trust being postponed until he filed such bond as the county court should order. *McWilliams v. Gough*, 576

UNDUE INFLUENCE. See GIFTS, 2.
UNIFORMITY. See CONSTITUTIONAL LAW, 5.
ULTRA VIRES. See INSURANCE, 14.
USES AND TRUSTS. See WILLS, 14.
VALUE. See PHYSICIANS.

VENDORS.

See CONTRACTS, 14–16, 20–23. INSURANCE, 8. LANDLORD AND TENANT, 4–7.

1. In an action against a vendor for breach of his covenant of seisin the complaint, among other things, alleged that the vendor never had possession, actual or constructive, of the land conveyed, nor any title or interest therein, and that other persons named had the title in fee simple and lawful right to the land under recorded tax deeds. *Held*, that a cause of action for breach of the covenant of seisin was stated, although tax deeds do not always divest the title of the original owner. *Koepke v. Winterfield*, 44
2. In such case where the cause of action alleged is not for rescission of the conveyance, but for damages for breach of the covenant of seisin, the plaintiff need not allege a reconveyance or an offer to reconvey the land. *Ibid.*
3. In an action against a vendor for false representations in the sale of land, the complaint, among other things, alleged that the representations as to title were made with intent to defraud the plaintiff; that she, relying thereon, conveyed her house and lot to defendant in exchange for the land, and that the vendor knew, at the time, of outstanding tax deeds, ownership and title. *Held*, that the pleading stated facts sufficient to constitute a cause of action for damages for the alleged fraud. *Ibid.*
4. An acion against a vendor for breach of his covenant of seisin may be joined with an action against him for false representations in the sale of the same land. *Ibid.*
5. A provision in a contract for the sale of lands that, on the vendee's default, he should hold the premises from the date of the contract as tenant at sufferance of the vendor, subject to be removed as a tenant holding over by process, under the statute in such case made and provided, is ineffective to change the relationship between the vendee in possession and the vendor to that of landlord and tenant, or deprive such vendee of his rights and equities under his contract of purchase. *Wright v. Roberts*. 22 Wis. 161, distinguished; *Diggle v. Boulden*, 48 Wis. 477, followed. *Hill v. Sidie*, 602
6. Sec. 2302, Stats. 1898, provides that an interest in land cannot be surrendered otherwise than by act or operation of law, or by deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. *Held*, that a surrender of a land contract by the vendee to the vendor, and acceptance thereof, coupled with an intention by both parties to extinguish the vendee's equity, satisfies the statute. *Hogue v. Farmers' M. F. Ins. Co.* 656

VERDICT. See APPEAL, 13, 14. BILLS AND NOTES, 7, 8. CONTRACTS, 2, 6. FALSE IMPRISONMENT, 1, 2. GARNISHMENT, 1. SLANDER. STREET RAILWAYS. TRIAL, 7. SHIPPING.

VESTED RIGHTS. See CONTRACTS, 21. INSURANCE, 12. TRUSTS AND TRUSTEES, 5. WILLS, 12, 13, 15.

VOLUNTARY APPEARANCE. See JUDGMENTS, 7, 8

VOLUNTARY ASSOCIATIONS. See ARBITRATION, 4–6. ASSOCIATIONS. INSURANCE, 13–21.

WAIVER. See FRAUD, 1, 5–7, 12. INSURANCE, 18, 20, 21, 23. LANDLORD AND TENANT, 1. MORTGAGES. NEGLIGENCE, 7. SALES, 3, 10.

WARRANTY

See HUSBAND AND WIFE, 6. LANDLORD AND TENANT, 2, 3. PHYSICIANS, 1, 3. SALES.

A warranty is always a representation, but the reverse is not necessarily true, the first being a more comprehensive term. *Matteson v. Rice*, 328

WATER RATES. See CERTIORARI, 3. MUNICIPAL CORPORATIONS, 11–13.

WATERS AND WATER COURSES. See RAILROADS, 10–12

WATERWORKS. See MUNICIPAL CORPORATIONS, 4–13.

WILLS.

See INSURANCE, 9–12.

Construction: Duties of executor: Power of sale.

1. The will of testator devised his homestead to his four children. It further provided that all the residue of his estate should go to them in trust to sell and distribute to beneficiaries named. By a codicil, made after the death of one child, he gave one-twelfth of his estate to the children of such deceased child, to be held for them in trust, and directed that immediately after his death his homestead be sold and the proceeds disposed of according to the terms of the will and codicil. The will appointed an executor, and appointed the testator's children as trustees to sell and distribute the residuum of the estate. Sec. 2128, Stats. 1898, provides that when a power in trust is created by will, and the testator has omitted to designate by whom the power is to be executed, its execution shall devolve upon the circuit court. *Held*, that sec. 2128 did not apply; that by the terms and provisions of the will the sale of the homestead was made a part of the administration of the estate, and, having appointed an executor, thereby the testator designated such executor to make such sale. *Lawrence v. Barber*, 294
2. In such case, it was error to assume that the testator had omitted to designate by whom the power of sale was to be executed, and, by applying said sec. 2128 to the situation under said will, appoint a trustee to make such sale. *Ibid.*
3. In such case, there was nothing in the will expressly giving the trustees, appointed to sell and distribute the residue of the estate, any right or authority over the homestead. *Held*, that the sale of the homestead being a duty to be performed by the executor as part of the administration of the estate, and the proceeds, when realized, being a part thereof, such proceeds should be paid and distributed, as personalty, directly to the beneficiaries named, and it was therefore error to direct the executor (appointed by the court trustees for the purpose of making sale

of the homestead) to pay over the proceeds to the three children as trustees, to be by them immediately distributed. *Ibid.*

4. Testator gave his homestead and household effects to his four children, and the residue of his estate to them as trustees for sale and distribution among designated beneficiaries. After the death of one child, he made a codicil by which he gave to the children of such deceased child one-twelfth interest "in all my estate, real, personal, and mixed." The codicil further provided that the homestead be sold, and that its proceeds be disposed of "according to the terms of my will and the provisions of the codicils thereof." *Held*, that the word "all" in the express command that the grandchildren were to have one-twelfth of all the estate, was too significant, definite, and unambiguous to warrant a construction that would deprive the grandchildren of one-twelfth of the proceeds of the homestead. *Ibid.*

Same: Testacy or intestacy: Bequests by implication.

5. Where a decedent has left a will, the question whether intestacy exists as to any part of his estate, and the rights of his heir thereto, depends not upon whether the testator intended such situation to exist, or supposed it would exist, but whether he has, by his will, disposed of all his property. *Lawrence v. Barber*, 294

6. In determining whether there is intestacy as to any part of a testator's estate, it is not absolutely imperative that express and unambiguous words of gift and designation of beneficiaries should be physically written in the will; it is sufficient that the court can find by necessary implication from the words used, that the testator had an intent that his property should go in a certain direction, and that he has so attempted to declare that intent. *Ibid.*

7. The presumption that one who makes a will intends to dispose of all his property is not conclusive on the question of intestacy. In determining that question, it is not without weight in interpreting and construing the language used, and may be used to aid the court in understanding what was attempted to be expressed. *Ibid.*

8. Testator gave his homestead to his four children, and the residue of his estate to them in trust for sale and distribution among the four children and another. One child having died, he made a codicil reciting that he desired to modify that portion of his will giving certain of his estate to the deceased son, one of the four, and did modify it by revoking all devises and bequests made to him. He then gave to the deceased son's two children a one-twelfth interest in all his estate, to be held in trust until their majority, provided, if either died during minority, that then a proportionate part of the devise should revert to the estate to be divided according to the provisions of the will and codicil. He expressly forbade the mother of the children from acting as trustee, and expressed a desire that none of his estate should, either directly or indirectly, pass to her or under her control. He also directed that his homestead should be sold immediately after his death, and the proceeds disposed of according to the terms of his will and codicil. In all other particulars he ratified his will. *Held:*

(1) That the last will of testator consisted not of one paper,

but of the will and codicils together, and that they, interacting on each other, spoke his purpose that the entire estate should be divided between the five persons in the proportions named.

(2) That none of his estate was intestate property.

(3) That the grandchildren took their one-twelfth of the residuum of the estate subject to the trust created by the will.

(4) That the grandchildren had no interest in the question whether or not the trust was valid as to the interests of those who were at once trustees and beneficiaries, nor whether there was any merger as to such interests. *Ibid.*

Same: Support of beneficiary: Claim against estate.

9. A testator expressly charged his estate with the support of his son Henry "during his natural life," and expressly provided that in case said son survived his mother, and remained unmarried, as he did, "all of his real and personal estate remaining" should go to his said son "during his natural life, for his said Henry's support," and at his death to be divided equally between the testator's "legal surviving heirs, share and share alike." *Held*, that said son Henry, by virtue of such provision of the will, had the absolute right to such support out of his father's estate, independently of any contract with any one authorized to represent the estate. *Warburton v. Williams*, 557

10. In such case, the rights of the testator's heirs in his estate are subject and subordinate to Henry's right to support. *Ibid.*

11. Plaintiff, a grandson of said testator, and nephew of Henry, after the death of testator's widow, furnished said Henry with his support, etc. On the death of Henry, plaintiff was appointed administrator of Henry's estate and filed his claim therein for such support, and, on its allowance, filed it against testator's estate. *Held*, that plaintiff was entitled to reasonable compensation out of the estate of testator for the support so furnished. *Ibid.*

Same: Vested or contingent estates.

12. Testator devised a life estate in all his property to his wife so long as she remained his widow, and, at her death, directed that the property be equally divded between four of his children. The third clause of the will provided that, if the wife should marry, the property should be sold, and, after paying his wife certain bequests, the remainder should be divided among the same four children. The will also declared that no other person or persons, except those mentioned, should have any share in the property, and that he had previously given to his other children all he intended them to have. *Held*, that under sec. 2037, R. S. 1878, the interests of the four children mentioned vested at once on the death of the testator. *Smith v. Smith*, 570

Same: Conditions subsequent.

13. A testator devised the residue of his estate, consisting of land, to his son (who had disappeared) on condition that if he was not heard from within ten years from the date of the will the land should go to nephews and nieces. Before the expiration of the ten years the son's wife, on the ground of desertion, obtained a divorce *a mensa et thoro*, and the judgment therein adjudged to her whatever right, title and interest the son had in the testator's lands. Afterwards, on ejectment being brought

against the son's wife, judgment was rendered adjudging that under the will a present estate in fee was vested in the son, but not deciding whether such estate was a base fee by reason of the condition, or whether such condition was void because too indefinite to be enforced. After the ten years had elapsed, the son not having been heard from, the nephews and nieces brought ejectment against the son's wife. *Held*, that the conditions annexed to the devise, with the limitation over to the plaintiffs, was binding, and, the ten years having expired, the title to the land vested in plaintiffs, as tenants in common. *Connor v. Sheridan*, 666

Same: Equitable conversion: Rights of beneficiaries.

14. A will devised the real estate of testatrix to G., as executor and trustee, with directions to support her step-son during his life, and provided that, on his death, the land should be sold and the proceeds divided among testatrix's children who should then be living, and the heirs of those who had deceased. *Held*, that the mandatory language of the will, requiring the real estate devised to the executor and trustee to be converted by him into money and distributed in that form to the ultimate beneficiaries, by the doctrine of equitable conversion, impressed on the real estate the character of personalty, and a trust in personal property was thereby created, which was not within the statute of uses and trusts. *McWilliams v. Gough*, 576

15. In such case, the children of testatrix, some before and some after the death of the step-son, quit-claimed their interests in such real estate to plaintiff, who brought this action against the executor and trustee to quiet title in himself. *Held*, that the title to such real estate vested in fact, as well as in form, in the executor and trustee; that there was no way by which the title thereto could pass from the executor and trustee to the beneficiaries under the will by mere operation of law, and that such beneficiaries not possessing any title, their deeds vested no title in their grantee. *Ibid.*

16. Such deeds only gave plaintiff an equitable right to stand for his grantors in the distribution of the trust fund under the terms of the will. *Ibid.*

17. A will devised lands to executors and trustees to hold in trust for the support of a step-son, and provided on his death that such lands be sold and the proceeds divided among several beneficiaries. *Held*, that each beneficiary was entitled to the full benefit of a complete execution of the trust as designed by the testatrix, and the election of one beneficiary to take land instead of money, cannot, as against a non-consenting beneficiary, reconvert what is in effect a bequest of personalty into realty. *Ibid.*

18. A will provided that certain lands should be held in trust for the support of testatrix's step-son, and, on his death, should be sold and the proceeds paid to testatrix's five children, "share and share alike," provided, in case of the death of any of such children before the step-son, that the share coming to such deceased child should be paid to his heirs in equal parts. All of testatrix's children survived her, and one of them died before the step-son leaving children *Held*, that the executor and trustee should divide the proceeds one-fifth to each of the children

of testatrix living at the step-son's death, and one-fifth, share and share alike, to the children of the child who predeceased the step-son. *Ibid.*

Testamentary trustees. See EXECUTORS AND ADMINISTRATORS, 8. TRUSTS AND TRUSTEES, 5.

WITNESSES.

See ASSAULT AND BATTERY, 2.

1. An instruction that, if the jury find any witness has sworn falsely as to any material fact, the jury is at liberty to reject his entire testimony, unless corroborated, is erroneous in omitting the element of wilful false swearing. *Gehl v. Milwaukee Produce Co.* 263
2. A requested instruction that the jury, in determining the credibility of the plaintiff, may consider the motive he had to testify in his own favor, is properly modified by striking out from the requested instruction the clause, "and you should especially remember how far he is contradicted by disinterested witnesses upon the most material matters." *Meyer v. Milwaukee E. R. & L. Co.* 336
3. Where a wife is defending an action in a representative capacity, an objection to competency of her husband as a witness is not tenable. *Gordon v. Sullivan,* 543

WORDS AND PHRASES.
Amount of loss, in insurance policy. See INSURANCE, 3.
Amount of liability, in insurance policy. See INSURANCE, 4.
Amount of the insurance. in insurance policy. See INSURANCE, 2.
All, in will. See WILLS, 4.
All stocks issued, in statute. See CORPORATIONS, 1.
Franchise, in statute. See QUO WARRANTO, 2.
Holding and exercising any franchise, in statute. See QUO WARRANTO, 3.
Issue any stock, in statute. See CORPORATIONS, 1.
Loss, in insurance policy. See INSURANCE, 1.
Market value. See DAMAGES, 3.
Occupation, in insurance policy. See INSURANCE, 27.
Person, in statute. See QUO WARRANTO.
Proximate cause, in instruction to jury. See NEGLIGENCE, 1.
To be taken as ordered, in contract. See CONTRACTS, 4.
Within the scope of the agency. See PRINCIPAL AND AGENT.

WRITS.
Of attachment. See ATTACHMENT. SUMMONS, 2–4.
Of *certiorari*. See CERTIORARI.
Of *mandamus*. See MANDAMUS.

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